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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 463

UNITED SHOE MACHINERY CORPORATION,
Petitioner,

v.

THE HANOVER SHOE, INC.,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF OF RESPONDENT THE HANOVER SHOE, INC.

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INDEX

PAGE

A. As to Questions Presented in United Brief 3-4 1

B. As to Statement of the Case in United Brief 4-22 2

1. As to the section "1. The Parties and the Lease Transactions," United Brief 4-7 2

2. As to section "2. Decree in the Government Suit," United Brief 7-12 5

3. As to section "3. Treble Damage Litigation Arising out of the Government Decree," United Brief 13-14 6

4. As to section "4. Hanover's case," United Brief 14-22 6

Summary of Argument 9

Argument 15

I Answer to United Brief, Points IA and IB, pp. 27-33, that the decree, the opinion and findings of the District Court and the contentions of the parties in the Government case shown that United's lease-only policy was not held to constitute monopolization 15

II Answer to United Brief, Point IC, pp. 33-38, that refusal by the District Court below to certify to the Massachusetts District Court questions of construction of the final decree in the Government case was an abuse of discretion 25

III Answer to United Brief, Point ID, pp. 38-41, that Clayton Act §5(a) gives prima facie effect only to "findings made expressly or by necessary implication in the Government case" and excludes making "lease-only a violation by inference" 31

PAGE

IV Answer to United Brief, Point IE, pp. 41-43, that Hanover was not within the "target area" of United's violation and may not, therefore, rely upon the final decree in the Government case 32

V Answer to United Brief, Points IIA and IIB, pp. 43-52, that it would be "especially unjust" and "grossly unfair" to United to apply the Government case retroactively 37

VI Answer to United Brief, Point IIIA, pp. 52-56, and to Point IV, p. 61, that Hanover sustained no injury because it would not have bought the machines and because cost of capital considerations show that Hanover sustained no loss by leasing 44

VII Answer to United Brief, Point IIB, pp. 57-60, that a condition precedent to Hanover's recovery is prior demand to buy and Hanover failed to make such a demand of United 48

VIII Answer to United Brief, Point IVB, pp. 61-66, that Hanover sustained no damage because "any excess cost of leasing over cost of ownership was not absorbed by Hanover but passed on to others" 53

IX Answer to United Brief, Point V, pp. 66-71, that Hanover's recovery "is barred by the Pennsylvania six year statute of limitations" 60

CONCLUSION 61

APPENDIX A

Excerpts from transcript of oral argument in the Supreme Court of the United States in *United Shoe Machinery Corporation* v. *United States*, October Term, 1953, No. 394 ..... 1a

APPENDIX B

PAGE

Excerpts from Findings of Fact, Conclusions of Law and Opinion of Judge Sheridan dated April 28, 1965 in the United States District Court for the Middle District of Pennsylvania, *reported* 245 F. Supp. 287-294 ..... 1b

TABLE OF CASES

Alcoa (United States v. *Aluminum Co. of America),* 148 F. 2d 416 (2d Cir. 1945) 41, 52, 53
Alden-Rochelle, Inc. v. *American Society of Composers, Authors and Publishers,* 80 F. Supp. 888 (S.D.N.Y. 1948) 57
Aldrich v. *Aldrich,* 375 U. S. 75 and 249 (1963) 30
American Crystal Sugar Co. v. *Mandeville Island Farms,* 195 F.2d 622 (9th Cir. 1952), *cert. denied* 343 U. S. 957 57
American Tobacco Co. v. *United States,* 328 U. S. 781 (1946) 4, 41, 42, 53
Atlantic City Elec. Co. v. *General Elec. Co.,* 226 F. Supp. 59 (S.D.N.Y.), *appeal denied* 337 F.2d 844 (2d Cir. 1964) 57, 58, 59
Chattanooga Foundry & Pipe Works v. *City of Atlanta,* 203 U. S. 390 (1906) 34, 56, 58
Clark Oil Co. v. *Phillips Petroleum Co.,* 148 F.2d 580 (8th Cir. 1945), *cert. denied* 326 U. S. 734 57
Clay v. *Sun Ins. Office Ltd.,* 363 U. S. 207 (1960) 30
Cole v. *Hughes Tool Company,* 215 F. 2d 924 (10th Cir. 1954) *cert. denied* 348 U. S. 927 25
Commonwealth Edison Co. v. *Allis-Chalmers Mfg. Co.,* 315 F.2d 564 (7th Cir. 1963) *cert. denied* 375 U. S. 834 ..... 57, 58
Commonwealth Edison Co. v. *Allis-Chalmers Mfg. Co.,* 335 F.2d 203 (7th Cir. 1964) 57, 58, 59
Conference of Studio Unions v. *Loew's Inc.,* 193 F.2d 51 (9th Cir. 1951), *cert. denied* 342 U. S. 919 34
Continental Ore Co. v. *Union Carbide & Carbon Corp.,* 289 F.2d 86 (9th Cir. 1961) *rev'd* 370 U. S. 690 (1962) 13, 50

PAGE

W. B. Coon Co. v. *United Shoe Mach. Corp.*, W.D.N.Y., Civil No. 6841, dismissed April 12, 1963 ..... 25, 29

Dresner v. *City of Tallahassee*, 375 U. S. 136 (1963) 30

Emich Motors Corp. v. *General Motors Corp.*, 340 U. S. 558 (1951) *dismissal on remand aff'd* 229 F. 2d 714 (7th Cir. 1956) 31

England v. *Louisiana State Bd. of Medical Examiners*, 375 U. S. 411 (1964) 30

Escobedo v. *Illinois*, 378 U. S. 478 (1964) 43

Gelpcke v. *City of Dubuque*, 68 U. S. 175 (1863) 42

Griffin v. *California*, 380 U. S. 609 (1965) 43

Hanover Shoe, Inc. v. *United Shoe Machinery Corp.*, 185 F. Supp. 826 (M. D. Pa.) *aff'd per curiam* 281 F.2d 481 (3d Cir. 1960), *cert. denied* 364 U. S. 901 7, 53

Hartford-Empire Co. v. *United States*, 323 U. S. 386 (1945) 40

Johnson v. *New Jersey*, 384 U. S. 719 (1966) 43

Karseal Corp. v. *Richfield Oil Corp.*, 221 F.2d 358 (9th Cir. 1955) 33, 35

Linkletter v. *Walker*, 381 U. S. 618 (1965) 43

Lyons v. *Westinghouse Elec. Corp.*, 235 F. Supp. 526 (S.D.N.Y. 1964) 42

Mapp. v. *Ohio*, 367 U. S. 643 (1961) 43

Milwaukee Towne Corp. v. *Loew's, Inc.*, 190 F.2d 561 (7th Cir. 1951), *cert. denied* 342 U. S. 909 52

Miranda v. *Arizona*, 384 U. S. 436 (1966) 43

Northwestern Oil Co. v. *Socony-Vacuum Oil Co.*, 138 F.2d 967 (7th Cir. 1943), *cert. denied* 321 U. S. 792 57

Ohio Valley Elec. Corp. v. *General Elec. Co.*, 244 F. Supp. 914 (S.D.N.Y. 1965) 57

Peto v. *Howell*, 101 F. 2d 353 (7th Cir. 1938) 56

Pfotzer v. *Aqua Systems*, 162 F.2d 779 (2d Cir. 1947) 56

PAGE

Productive Inventions, Inc. v. *Trico Prods. Corp.*, 224 F.2d 678 (2d Cir. 1955); *cert. denied* 350 U. S. 936 34

Public Util. Dist. No. 1 v. *General Elec. Co.*, 230 F. Supp. 744 (W. D. Wash. 1964) 57, 58

Royster Drive-In Theatres, Inc. v. *American Broadcasting-Paramount Theatres, Inc.*, 268 F.2d 246 2d Cir. 1959), *cert. denied* 361 U.S. 885 52

Simpson v. *Union Oil Co.*, 377 U. S. 13 (1964) 12, 41

Simpson v. *Union Oil Co.*, 270 F. Supp. 754 (N.D. Cal. 1967) 42

Southern Pac. Co. v. *Darnell-Taenzer Lumber Co.*, 245 U. S. 531 (1918) 14, 54, 58

Story Parchment Co. v. *Paterson Parchment Co.*, 282 U. S. 555 (1931) 56

Straus v. *Victor Talking Machine Co.*, 297 Fed. 791 (2d Cir. 1924) 56

Tehan v. *United States ex rel. Shott*, 382 U. S. 406 (1966) 43

Thomsen v. *Cayser*, 243 U. S. 66 (1917) 56

Twin Ports Oil Co. v. *Pure Oil Co.*, 119 F.2d 747, (8th Cir. 1941), *cert. denied* 314 U. S. 644 57

United States v. *Aluminum Co. of America*, 148 F.2d 416 (2d Cir. 1945) 41, 52, 53

United States v. *General Elec. Co.*, 272 U. S. 476 (1926) 42

United States v. *United Shoe Mach. Co.*, 222 Fed. 349 (D. Mass. 1915), *aff'd* 247 U. S. 32 (1918) 38, 39

United States v. *United Shoe Mach. Corp.*, 110 F. Supp. 295 (D. Mass. 1953), *aff'd per curiam* 347 U. S. 521 (1954) 16, 19, 20, 22, 38, 62

United States Gypsum Co. v. *National Gypsum Co.*, 352 U. S. 457 (1957) 26, 29

STATUTES

PAGE

Clayton Act §5(a), 69 Stat. 283 (1955), 15 U.S.C. §16(a) 11, 31, 34

Sherman Act §1, 26 Stat. 209 (1890), 15 U.S.C. §1 22

Sherman Act §2, 26 Stat. 209 (1890), as amended 69 Stat. 282 (1955), 15 U.S.C. §2 ..... 2, 15, 16, 21, 62

28 U.S.C. §1254 (3) 27

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BRIEF OF RESPONDENT THE HANOVER SHOE, INC.

The Hanover Shoe, Inc. (hereinafter Hanover), plaintiff below and respondent herein, submits this answer to the Brief (hereinafter Un. Br.) submitted by United Shoe Machinery Corporation (hereinafter United), defendant below and petitioner herein.

A. As to Questions Presented in Un. Br. 3-4.

In Point I E of its brief, pp. 41-43, United argues that Hanover was not within the "target area" of United's

monopolization. Hanover submits that this argument, rejected by both courts below, is not a "subsidiary question fairly comprised" in any of the questions presented in United's brief under Rule 40 1 (d) (1) of the Rules of this Court and that this Court should disregard it.

United, as was the case in the Court of Appeals, does not challenge as "clearly erroneous" under Rule 52(a) of the Federal Rules of Civil Procedure, any of the findings of fact by the District Court. This Court may, therefore, accept all such findings.

B. As to Statement of the Case in Un. Br. 4-22.

United's Statement of the Case in its brief, pp. 4-22, is more argumentative than factual.

1. As to section "1. The Parties and the Lease Transactions" Un. Br. 4-7. In place of this Hanover submits the following:

> This is an action for treble damages for violation of the antitrust laws in which Hanover, a shoe manufacturer, brought an action against United, a manufacturer of shoe machinery, to recover damages for injuries from violation of Section 2 of the Sherman Act through alleged monopolization of the shoe machinery industry and alleged monopolistic practices with respect to substantially all shoe machinery required and used by Hanover in the manufacture of men's welt shoes.
>
> After trial before the District Court without a jury the Court concluded that United had violated Section 2 of the Sherman Act. It found that, among other matters, United's market share ranged from 89% to 100% of the 20 major machine types, the rentals and royalties of which accounted for more than 80% of the charges

paid by Hanover to United.* It further found that United made its principal shoe machinery, including the 58 machine types leased by Hanover, available to shoe manufacturer customers only on lease and that as a result of the unlawful monopolization Hanover was required to pay more for leasing the shoe machinery it needed and used than it would have been required to pay had it been able to buy machinery in a free and competitive market and that Hanover was injured and sustained damage thereby (A. 106-107) 245 F. Supp. 298.

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* The finding of the District Court on evidence as of May, 1947, not challenged by United, is that:

"Of the 20 major machine types included in the 56, the rentals and royalties of which accounted for more than 80 percent of the charges Hanover paid United, United's market share was:

100%	4 types
99%	6 types
98%	4 types
97%	3 types
89—93%	3 types
	20

There is no evidence that United suffered any appreciable limitation in its share of the market with respect to these machine types prior to the filing of the complaint."

(A 34-35) (245 F.Supp. 265-266)

"As of about May, 1947, United's share of the market of 56 of the 58 lease-only machine types leased by Hanover—there being no data in evidence as to the remaining two—was as follows:

100%	10 types
99%	14 types
98%	7 types
97%	4 types
96%	5 types
90—95%	9 types
85—89%	1 type
80—84%	3 types
55—69%	3 types
	56"

(A 34) (245 F.Supp. 265)

The District Court fixed the period of time for which Hanover might recover damages as July 1, 1939 through September 21, 1955 (A. 107) 245 F. Supp. 298-299. There is no dispute as to this (A. 97, fn. 15; A. 210-211) 245 F. Supp. 294 fn. 15; 377 F. 2d 790-791.* The District Court fixed the amount of Hanover's damage during this period of some 16 years as $1,413,203 (A. 166) 245 F. Supp. 302 and entered judgment for $4,239,609 after trebling (A. 180).

On appeal by United, the Court of Appeals vacated the judgment of the District Court as to damages and awarded a new trial limited to damages in accordance with the opinion of the Court (A. 217-218, A. 223-226) 377 F.2d 793.

The Court of Appeals held that the District Court had committed error:

(a) In failing to reduce the amount of the damages by the amount of the reduction in taxes that accrued to Hanover during the damage period by reason of leasing its shoe machinery from United rather than owning it, assuming it had a choice (A. 213-215) 377 F.2d 792-793; and

(b) In awarding damages to Hanover for the period July 1, 1939, the commencement of the applicable statute of limitations, through June 10, 1946, the date of the decision of this Court in *American Tobacco Co.* v. *United States*, 328 U.S. 781, (A. 203-209) 377 F.2d 787-790.

The foregoing are the only two points on which the Court of Appeals held against Hanover. These two points are raised and briefed by Hanover in No. 335.

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* The Court of Appeals held that the damage period ended not on September 21, 1955 but on June 1, 1955, the date on which "the unlawful lease-only policy had ended," (A. 211-212) 377 F.2d 776, 791. This was the effective date of the final decree in the Government case. Hanover makes no issue on this point.

Both courts below held for Hanover on all the points in United's petition in No. 463.

In this section United does no more than argue that since 1912 Hanover "benefited from and prospered under" United's leasing system, Un. Br. 5, that Hanover never "formulated" any claims until 1955, *ibid.*, that it used United's lease-only machines without protest, *ibid.*, and that it enjoyed advantages under the lease system and "prospered" under it, Un. Br. 6-7.

The answers to these claims are in the findings of the District Court of injury to Hanover causing damages in the amount of $1,413,203 (A. 166, 180) 245 F. Supp. 302, the findings as to Hanover's constant efforts to buy machinery and to persuade United to offer more of its machinery for sale, *see* pp. 48-50, *infra,* and in Hanover's substantial purchases of United machinery at the first opportunity following the availability of machinery for purchase under the terms of the final decree in the Government case (see pp. 49-50, *infra*). These findings stand unchallenged.

2. As to section "2. Decree in the Government Suit," Un. Br. 7-12.

Here United introduces the argument repeated and developed more fully under Argument I A, B, Un. Br. 27-33, and II, A (1), Un. Br. 43-46. Hanover makes its answer, *infra* pp. 15-23, 39-44.

We mention here only the extraordinary statement that Government counsel in argument before this Court in 1953 in the Government case "took the view we now urge as to that decree's recognizing the entire propriety of this lease-only system, and so represented to this Court," Un. Br. 11. Even the brief excerpts from the oral argument quoted in United's brief, pp. 11-12, point to no such conclusion. On

the contrary it is clear that Government counsel's answers to questions were entirely correct. The Government had never sought to prohibit leasing as such.

We have reviewed the transcript of argument and have, in Appendix A hereto, quoted a few excerpts from the arguments of Mr. Branch, counsel for United, and of Mr. Spritzer, counsel for the Government. Mr. Branch knew full well that lease-only was under attack. He said so. Mr. Spritzer did not abandon the Government's attack on lease-only. Rather he made clear that there was no objection to leasing as such, provided customers had an option to buy.

3. As to section "3. Treble Damage Litigation Arising out of the Government Decree," Un. Br. 13-14.

We do not understand the relevance of this section of United's Statement of the Case and Hanover will disregard it.

4. As to section "4. Hanover's Case," Un. Br. 14-22.

"(a) Passing-On Trial Before Goodrich, J.", Un. Br. 15-16.

United states the passing-on case as though the only claim before Judge Goodrich was Hanover's secondary claim of excessive lease costs, a claim that was held not to have been proven below (A. 55-57) 245 F. Supp. at 276. The fact is that Hanover's complaint makes an alternate claim — its primary claim below — of damages resulting from Hanover's being "prevented from acquiring shoe machinery, new or used, as owner either from United or elsewhere" (complaint par. 25(b), A. 19). It was on this claim that Hanover prevailed below (A. 106-107, 162-166) 245 F. Supp. at 298, 299.

"(b) Plenary Trial Before Sheridan, J." Un. Br. 16-17. Building on its earlier misstatement, United starts this

section with the wholly erroneous statement that at the trial, following the decision in the separate trial on the passing-on issue, Hanover "embarked upon an entirely different theory of damages," Un. Br. 16. This is simply not true. Two types of injury causing damage to Hanover were alleged in the complaint (complaint, par 25(a)(b), A. 19). Both were pressed at trial and while Hanover lost on one (A. 55-57) 245 F. Supp. at 276, it prevailed on the other (A. 106-107, 162-166) 245 F. Supp at 298, 299. Both were before Judge Goodrich and the Court of Appeals in the passing-on case.*

While United here refers to an "artificial figure constructed for the purpose, that is, a putative purchase price of leased machinery calculated . . . on assumptions provided by Hanover's counsel", Un. Br. 16, it carefully refrains from describing the calculations or the assumptions. In the interests of accuracy and completeness, even though United has raised no issue before this Court as to Hanover's theory of damages accepted by both courts below, we supply what United has hidden. In Appendix B hereto we set forth the detailed and precise findings of Judge Sheridan relating to each item involved in the damage calculation.

United attempts to state the 81 page decision of Judge Sheridan in the District Court below (A. 27-107) 245 F. Supp. 258-299, and his 17 page supplemental and amended findings and opinion (A. 162-178) 245 F. Supp. 299-308, in a few paragraphs on pages 16-17 of its brief. These 98 record pages of Judge Sheridan's findings and decision reflect a comprehensive and painstaking effort that cannot be briefly summarized. They reflect a scrupulous

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* *The Hanover Shoe, Inc.* v. *United Shoe Machinery Corporation*, 185 F.Supp. 826 (M. D. Pa.) *aff'd per curiam*, 281 F.2d 481 (3d Cir. 1960) *cert. den.* 364 U. S. 901 (1960) *rehearing den.* 364 U. S. 939 (1961).

regard for record facts and precision in making findings on all matters in issue. United has challenged none of these findings as clearly erroneous. The conclusions of law and opinion likewise deal in depth with all issues raised by United and Hanover.

In the Argument sections of this brief we state relevant findings and conclusions in the course of our answers to United's arguments.

"(c) Hearing Before Wyzanski, J., and Refusal of Sheridan, J. to Certify Question", Un. Br. 17-21.

This section is no more than an introduction to the argument made in Point I C, pp. 33-38 of United's brief. Hanover makes its answer *infra*, pp. 25-30.

United here makes much of its unsuccessful effort to persuade Judge Wyzanski to construe the final decree in the Government case in a manner agreeable to United. This Judge Wyzanski declined to do (A. 148-150). United now asks this Court to disregard not only Judge Wyzanski's decision but also the plain statement of Government counsel at the hearing before Judge Wyzanski:

"Miss Brass: Your Honor, I do not read the Court's decisions as being different or being opposed to what Judge Sheridan has ruled" (A. 142).

Hanover respectfully submits that this Court should disregard United's abortive attempt to secure a ruling from Judge Wyzanski and now, having failed, to persuade this Court to attempt to discover what might have been in Judge Wyzanski's mind when he denied United's application.

The Government case was appealed to and decided by this Court and this Court did not merely affirm without opinion but held that "the findings are justified by the evidence and support the decree," 347 U. S. at 521. In the light of this holding no reason appears why this Court

should now ask Judge Sheridan to ask Judge Wyzanski what he did or did not have in the back of his mind when he made his findings and entered the decree twelve years before.

"(d) Court of Appeals Decision", Un. Br. 21-22.

The opinion and supplemental opinion of the Court of Appeals occupy 38 pages of the record (A. 185-222) 377 F. 2d 776-795, and are not faithfully summarized and stated in the two paragraphs United devotes to them.

We note once more that before the Court of Appeals United did not challenge as "clearly erroneous" any of the extensive findings of fact of the District Court. All of the findings survived scrutiny by the Court of Appeals. None was overturned.

Summary of Argument

1. Answer to United Brief, Points 1 A and 1 B, pp. 27-33. United argues that its lease-only policy was not held to constitute monopolization in the Government case and that consequently the final decree in that case is not prima facie evidence of Hanover's claim of monopolization. Hanover answers that not only did it have other evidence of monopolization, as shown in the findings of the District Court below, but also that United's lease-only policy as practiced by it was in issue in the Government case in specific allegations of the complaint that were not controverted in United's answer, that the illegality of this pol was specifically adjudicated and that it was ordered t discontinued in the final decree. Both courts below so read the Government case and United's claim to the contrary is also contradicted by its own statements in its brief to this Court in the Government case. Its effort to attribute a

disclaimer of this position to Government counsel in argument to this Court is wholly without foundation in the excerpts of the argument of Government counsel quoted by it, and also in the arguments of United's own counsel, Appendix A.

2. Answer to United Brief, Point 1 C, pp. 33-38. United urges error in the denial of its motion by the District Court, made only after adverse decision by that court, to certify to the District Court for the District of Massachusetts, the court that had decided the Government case, questions as to the interpretation of the final decree entered by it in that case. The District Court below properly denied this motion, addressed to its discretion, as untimely and the Court of Appeals affirmed. United's motion was also untimely in relation to the proceedings prior to decision by the District Court below.

The issue as to the interpretation of the final decree in the Government case has been presented by United from the outset of this action. Whether timely or not, Hanover submits that there is no procedure under the Federal Rules of Civil Procedure or under federal practice that permits one District Court to seek the advice of another on a question of law that it is required to decide. The proper construction of a final decree entered by another District Court in an antitrust or other case presents no novel situation. No statute or rule or precedent exists for the procedure urged here by United and there was no error in denying United's belated application that lacked support, even if timely.

3. Answer to United's Brief, Point 1 D, pp. 38-41. United argues that a holding of illegality of United's lease-only policy in the Government case is no more than a possible

inference and that this is insufficient to make the final decree available to Hanover as "prima facie evidence" of monopolization under the Clayton Act. Hanover repeats the answer made under par. 1, above, that United's lease-only policy was squarely in issue and adjudicated to be illegal in the Government case. There is no question of possible inference, as United argues.

4. Answer to United's Brief, Point 1 E, pp. 41-43. United argues that only competing shoe manufacturers were within the "target area" of United's monopolization of shoe machinery and that Hanover, a shoe manufacturer, was not. Hanover answers that this point is not one of the seven questions presented in United's brief, pp. 3-4, nor fairly comprised within any one and should, therefore, be disregarded. In any event, both courts below were correct in holding that the aim of United's monopolization was wide enough to hit both competitors and customers and that no more direct injury could be inflicted than in the relation between a machinery monopolist and its customers, of which Hanover was one.

5. Answer to United's Brief, Points II A and II B, pp. 43-52. United tries to show that it would be "especially unjust" and "grossly unfair" to it to apply the adjudication of illegality of its lease-only policy in the Government case retroactively and thus permit Hanover to use it as evidence in support of its claim for damages. Hanover answers that it has met the requirements of the Clayton Act and is entitled to recover, that United has made no showing that requires that special treatment be given to its loss of the Government case, that United's lease-only policy was not in issue much less approved by this Court in any of the earlier antitrust decisions in which United

was defendant prior to the Government case. United complains that the Government case worked "a change in the law" that should not be applied retroactively, citing *Simpson* v. *Union Oil Co.*, 377 U.S. 13 (1964). There is no such change of law in the Government case. There is plainly no overruling decision nor is there in this record any showing of reliance by United on an earlier rule. United has cited no precedent that would justify consideration of its plea for special treatment in a treble damage action. It should be rejected and no special exception for United recognized to bar Hanover's statutory right to use the final decree in the Government case in support of its statutory claim for treble damages.

6. Answer to United Brief, Point III A, pp. 52-56 and Point IV, p. 61. United argues that both courts below erroneously disregarded "cost of capital" and that, if it had been considered, Hanover would never have bought shoe machinery if it could and also its damage calculations based on purchases would have been substantially reduced. "Cost of capital," as found by the District Court, is an economic concept defined as the rate of return expected by investors on capital funds placed at the disposal of a business concern. Hanover's answer to United is that the unchallenged findings below are that Hanover had ample funds to purchase machinery, that it would have purchased if machinery had been available, that it would have had to pay no more than the prime rate of 1½% or 2% on money borrowed, if it had borrowed, and that this interest cost was deducted from Hanover's damage calculations. It was held that "cost of capital," urged by United, was not a proper element of the damage calculations, that it was not an item of expense, that Hanover's only capital cost was the interest that was deducted and that Hanover

would have incurred no cost of capital over and beyond such interest.

7. Answer to United Brief, Point III B, pp. 57-60. United argues that Hanover's claim is barred because it failed to demand that United sell its lease-only machines. Hanover's president testified that demand would have been foolish and the courts below held, as a matter of law, that in the circumstances of Hanover's case, demand would have been idle and futile and was not required. The circumstances, among others, were that lease-only had been continuously used by United, that shoe manufacturers regarded themselves as captive customers of United, that Hanover took part in a futile trade association effort to persuade United to offer machinery for sale, that Hanover actively searched for non-United machinery available for purchase and that it bought from United as soon as United machinery was available for purchase under the final decree in the Government case. The decision of this Court in *Continental Ore Co.* v. *Union Carbide and Carbon Corp.*, 370 U.S. 690 (1962) is controlling; the law does not require an empty demand under a "rigid or mechanical formula."

8. Answer to United Brief Point IV B, pp. 61-66. United raises again the claim that Hanover, a shoe manufacturer, may not recover because any excess cost of machinery was "passed on" by Hanover to its shoe customers and was recouped by it in the sale price of the shoes. This "passing on" defense was separately tried and Hanover prevailed before both courts below and this Court denied certiorari. The issue is reopened in the grant of United's cross-petition. Hanover relies on the earlier decision in answering that the causal relation between United and

Hanover, its customer, is direct and obvious and that Hanover's injury occurred when it was required to pay cash out of pocket that it should not have been required to pay to secure shoe machinery. This is the direct and immediate effect of United's monopolization. The law, as stated in *Southern Pacific Co.* v. *Darnell-Taenzer Lumber Co.*, 245 U.S. 531 (1918), does not require going beyond "the first step" and holds a defendant liable "if proximately the plaintiff has suffered a loss," at 533-534. Hanover's case meets this in full. Decisions of this Court and of many lower courts support this rule.

United's claim of a "windfall" to Hanover was rejected by the Court of Appeals in the "passing on" case, and in two of the recent electrical cases. Evidently United wants a windfall for itself in retention of the monopolist's gains. Hanover seeks recovery for damage done to it by United's monopolization.

9. Answer to United's Brief, Point V, pp. 66-71. United argues that Hanover's cause of action directed at lease-only accrued when this United policy started in or about 1912 and that it is now outlawed. Hanover answers that the wrong of which it complains is United's continuing monopolization throughout the applicable period of limitations. The Court of Appeals in accepting Hanover's claimed right to recover "for the separate invasion of its rights which occurred within the period [of limitations]" added that "any other rule would be an affront to reason" (A. 222) 377 F. 2d at 795. Hanover submits that this is correct.

ARGUMENT

I.

Answer to United Brief, Points IA and IB, pp. 27-33, that the decree, the opinion and findings of the District Court and the contentions of the parties in the Government case show that United's lease-only policy was not held to constitute monopolization.

United commences its argument with the erroneous statement that Hanover relied "solely", Un. Br. 27, upon the final decree in the Government case to prove violation of Section 2 of the Sherman Act by United. The District Court correctly stated that Hanover relied "primarily" (A. 35) upon that decree and concluded on this point that "With the aid of the decree Hanover has proved a monopolization" (A. 49). There was other substantial evidence of monopolization.*

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* Proof of United's market share in the Government case related to a period ending in 1947. Judge Sheridan below heard evidence regarding United's market position from 1947 until the filing of Hanover's complaint in 1955. He found that "There is no evidence that United suffered any appreciable limitation in its share of the market with respect to these [56 lease-only] machine types prior to the filing of the complaint [by Hanover] . . . Until 1955 United enjoyed an overwhelming share of the shoe machinery market which it controlled." (A. 35) 245 F. Supp. at 266. Judge Sheridan also found that "There was testimony that since the 1920's Hanover was actively engaged in a search to buy non-United Goodyear welt shoe machinery, . . . The search for machines was dormant shortly before and during World War II. Whenever shoemakers gathered, there was talk about the purchase of foreign machines after the war ended . . . .

"In 1949 the National Shoe Manufacturers Association (N.S.M.A.), of which Mr. Sheppard was president from 1946 through 1949 . . . formed a committee, with Mr. Sheppard as a member . . . to search for and disseminate information on modern non-United shoe machinery, to assist members in the evaluation of machinery, and to persuade United to offer more of its machinery for sale."

United compounds the first error with the further erroneous statement that it is essential to Hanover's case "that the decree constituted an adjudication that prior to the decree leasing as such by United was an antitrust violation", Un. Br. 27-28. Hanover has never made this contention. It is United's lease-only policy as practiced by it that Hanover attacks as unlawful and that, it submits, was in issue in the Government case, was adjudicated to be unlawful and was ordered to be discontinued in the final decree. United repeats its erroneous statement that Government counsel in argument before this Court "did not contend that lease-only constituted monopolization," Un. Br. 33. We refer to our comment on this contention, *supra*, pp. 5-6.

United's lease-only policy was put squarely in issue in specific allegations of the complaint and in the prayer for relief in the Government case.* The fact of lease-only was not controverted by United in its answer.**

(A. 65-66) 245 F. Supp. at 280. Again, "There is little evidence that major comparable non-United machines for use in the Goodyear welt process were available from United States manufacturers" (A. 71) 245 F. Supp. at 282, and "On the evidence in this case the conclusion is inescapable that there was 'very little suitable foreign machinery available and then only toward the end of the complaint period." (A. 78) 245 F. Supp. at 285. Indeed, "with very few exceptions, it is clear that no domestic non-United or foreign machines, comparable to United machines in capacity and performance, and for which there was service, parts and technical advice, were available to Hanover." (A. 79) 245 F. Supp. at 286.

* Complaint, *United States* v. *United Shoe Machinery Corporation*, Civil No. 7198, D. C. Mass., filed December 15, 1947 alleges, under Offenses Charged:

"27. Continuously from the year 1912 to the date of the filing of this complaint the defendant, United Shoe Machinery Corporation, has been violating Section 2 of the Sherman Act by:

(a) Monopolizing interstate trade and commerce in the shoe machinery industry of the United States;

(b) Monopolizing the manufacture and distribution in interstate commerce of all major shoe machines, except [listing machines not relevant here . . .]

* * *

"28. The defendant has attempted to monopolize and has monopolized the shoe machinery industry and the manufacture and distribution of shoe machinery, shoe machinery parts, shoe factory supplies, and tanning machinery, as hereinbefore alleged, by:

* * *

(c) Pursuing a manufacturing and marketing policy designed to prevent the installation in shoe factories of all competitive shoe machinery and to displace with United machinery all competitive shoe machinery installed in shoe factories;

* * *

"60. To forestall, restrict, and eliminate competition in the manufacture and distribution of shoe machinery United has continuously pursued a policy of (a) distributing most of its machinery upon leases which are intended to, and do, prevent shoe manufacturers from using competitive machinery; (b) adopting charges and other lease and sale terms for its machinery calculated to prevent the installation or cause the removal of competitive shoe machinery, and modifying said charges and terms for said purpose;

* * *

1. United's leasing policy

"61. For many years United has declined to sell most of its shoe machines and has made such machines available to shoe manufacturers only upon leases which reserve to United the sole and exclusive property in the machines and which grant to lessees the right to use the machines only for the purposes specified in the leases. United offers certain of its machines upon lease or sale terms at the option of shoe manufacturers but has followed the practice of establishing such alternative terms of sale and lease as will cause shoe manufacturers to lease such machines. As a consequence, most machines offered by United on optional terms are leased by shoe manufacturers.

"62. At present United offers on lease only all of its major machines, except sole cutting and certain leveling machines, . . ." (Paragraphs 61 and 62 are reprinted, A. 231-232)

* * *

EFFECTS OF THE VIOLATIONS OF LAW

"97. The aforesaid monopolization and attempts to monopolize and the acts, acquisitions, contracts, agreements, and understandings used in effectuation thereof, have had the following effects as intended by the defendant:

(a) The defendant controls and dominates the shoe machinery industry of the United States and has the power to exclude all others from said industry.

The District Court, in the Government case, in specific language in the section of its opinion on Alleged Violations, adjudicated the illegality of the policy:

> "Not only does the evidence show United has control of the market, but also the evidence does not show that the control is due entirely to excusable causes. The three principal sources of United's power have been the original constitution of the company, the superiority of United's products and services, and the leasing system. The first two of these are plainly beyond reproach. The original constitution of United in 1899 was judicially approved in United States v. United Shoe Machinery Company of New Jersey, 247 U. S. 32, 38 S. Ct. 473, 62 L. Ed. 968. It is no longer open to question, and must be regarded as protected

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(b) The defendant has the power arbitrarily to determine who may engage in the manufacture of shoes in the United States, the extent to which machinery shall be used in the manufacture of shoes in the United States, and the kinds of shoes which shall be manufactured in the United States.

* * *

PRAYER

"Wherefore, the plaintiff prays:

* * *

"6. That, upon the election of any lessee of the defendant and under such conditions and on such terms as the Court shall determine and order with due consideration for the rental and unit charges theretofore paid by said lessee to the defendant for the use of shoe machinery of the defendant, the defendant be required to sell to said lessee and divest itself of its entire right, title, claim, and interest to and in shoe machinery on lease to said lessee.

"7. That the defendant be required to offer to sell at reasonable prices all shoe machinery manufactured and commercialized by it and be enjoined from leasing shoe machinery except upon terms and conditions approved by the Court."

** To its answer to the complaint in the Government case United annexed exhibits containing lists of machines offered for sale only, Exhibit B; a list of machines offered for sale or lease (for monthly rental), Exhibit C; and three lists of machines offered for lease only, Exhibits D 1, D 2 and D 3, among which are all of the major important machines used by Hanover; *see* complaint pars. 7 through 13 and 16 (A 7-11, 12).

by the doctrine of *res judicata,* which is the equivalent of a legal license. Likewise beyond criticism is the high quality of United's products, its understanding of the techniques of shoemaking and the needs of shoe manufacturers, its efficient design and improvement of machines, and its prompt and knowledgeable service. These have illustrated in manifold ways that 'superior skill, foresight and industry' of which Judge Hand spoke in Aluminum, 148 F. 2d at page 430.

"But United's control does not rest solely on its original constitution, its ability, its research, or its economies of scale. There are other barriers to competition, and these barriers were erected by United's own business policies. Much of United's market power is traceable to the magnetic ties inherent in its system of leasing, and not selling, its more important machines. The lease-only system of distributing complicated machines has many 'partnership' aspects, and it has exclusionary features such as the 10-year term, the full capacity clause, the return charges, and the failure to segregate service charges from machine charges. Moreover, the leasing system has aided United in maintaining a pricing system which discriminates between machine types." *United States* v. *United Shoe Machinery Corp.,* 110 F. Supp. 295 at 344.

* * *

"In one sense, the leasing system and the miscellaneous activities just referred to (except United's purchases in the secondhand market) were natural and normal, for they were, in Judge Hand's words, 'honestly industrial'. 148 F. 2d at page 431. They are the sort of activities which would be engaged in by other honorable firms. And, to a large extent, the leasing practices conform to long-standing traditions in the shoe machinery business. Yet, they are not practices which can be properly described as the inevitable consequences of ability, natural forces, or law. They represent something more than the use of accessible resources, the process of invention and

innovation, and the employment of those techniques of employment, financing, production, and distribution, which a competitive society must foster. They are contracts, arrangements, and policies which, instead of encouraging competition based on pure merit, further the dominance of a particular firm. In this sense, they are unnatural barriers; they unnecessarily exclude actual and potential competition; they restrict a free market. While the law allows many enterprises to use such practices, the Sherman Act is now construed by superior courts to forbid the continuance of effective market control based in part upon such practices. Those courts hold that market control is inherently evil and constitutes a violation of §2 unless economically inevitable, or specifically authorized and regulated by law." (*Id.* at 344-345)

* * *

"It [United] has used its leases to monopolize the shoe machinery market. And if leasing continues without an alternative sales system, United will still be able to monopolize that market. To root out monopolization and to bring United, in the future, in the same class as its competitors, it is necessary not merely to place limitations upon United's leases, but also to require United to offer for sale any machine type which it leases. While, on its face, the decree seems to discriminate against United, in the context of the market situation created by United itself, the effect of the decree is to break down barriers erected by a monopolizer, so that, hereafter, there may be no wall between the class in which it is and the class in which its competitors are." (*Id.* at 350)

The lease-only system was clearly condemned.

Both courts below read the Government case this way (Court of Appeals, A. 198-203, 377 F.2d 785-787; District Court, A. 36-40, 46, 59-60, 245 F. Supp. 266-268, 271, 277). United's argument that the opinion in the Government case neither states nor implies that its lease-only policy

constituted monopolization, Un. Br. 30, pressed once more before this Court, is not even specious. Every bit of it is contradicted by the pleadings,* findings and adjudication in the Government case. And it is contradicted, as well, by United itself in its brief before this Court in the Government case:

> "The principal practices which the Court stressed were that defendant offered important complicated machines only for lease and not for sale and that defendant services the leased machines without a separate charge." *United States* v. *United Shoes Machinery Corporation*, U.S. Supreme Court Briefs, October Term 1953, No. 394, Potter's Antitrust News Service, p. 11.
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> * * *
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> "Evidently the Court regarded the fact that United distributes its more important machines only by lease and not by sale as the basic vice in the system." *Id.* at 32.
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> * * *
>
> "Evidently the Court below regarded the fact that United distributes its more important machines only by lease and not by sale as the basic objection to the system." *Id.* at 66.

These statements were correct then and still are.

This is confirmed when we turn to the language of the final decree and not merely to the two paragraphs that United refers to in its brief, Un. Br. 28-29. The Final Decree adjudges in plain language in par. 2 that "Defendant violated § 2 of the Sherman Act, 15 U.S.C. § 2 by monopolizing the shoe machinery trade and commerce among the several States . . .", and then, as a part of the

* See footnote * pp. 16-18 supra.

relief, puts an end to the lease-only policy in decreeing in par. 5 that "After A Day* defendant shall not offer for lease any machine type, unless it also offers such type for sale." 110 F. Supp. 295, 352.

United relies on the last sentence in par. 2 that "The other charges of violation of the Sherman Act set forth in the complaint are dismissed with prejudice," Final Decree, 110 F. Supp. 295 at 352. The "other charges" of violation so dismissed clearly had to do with alleged violations of Section 1 and with alleged violations with respect to named shoe factory supplies and to tanning machinery.**

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* " 'A Day' means six months after entry of this Decree, unless, within the period allowed by law, an appeal shall be taken to the Supreme Court of the United States, in which event 'A Day' means six months after that Court sends its mandate to this Court."

** See the analysis of the complaint by the District Court in the Government case, 110 F. Supp. 295 at 298.

The District Court read paragraphs 27 and 28, the charging paragraphs of the 52 page complaint, to charge "a three-pronged attack, directed to shoe machinery [par. 27(a)-(d)], shoe factory supplies [par. 27e] and tanning machinery [par. 27(f)]," *id.* at 298.

While the principal findings related to shoe machinery the District Court made specific and separate findings as to shoe factory supplies, *id.* at 346 and tanning machinery, *ibid.*

The final decree in par. 1 defines "shoe machinery" to mean "all types of shoe machinery except dry thread sewing machinery," 110 F. Supp. at 352, and then proceeds in par. 2 to adjudge that "Defendant violated § 2 of the Sherman Act, 15 U.S.C.A. § 2, by monopolizing the shoe machinery trade and commerce among the several States," *ibid.* It seems to us that this adjudication covers the full scope of the attack directed to shoe machinery.

This is confirmed, we submit, by the treatment of the attack on "shoe factory supplies." Here the adjudication of monopolization in par. 2 covers only "tacks, nails, eyelets, grommets and hooks." In the last sentence of par. 2 the "other charges" are dismissed.

We submit that the "other charges" are charges as to "tanning machinery" and the other "shoe factory supplies" not specifically named in the adjudication of monopolization. This is entirely in keeping with the findings made that were against the Government as to tanning machinery and as to factory supplies other than those specifically mentioned in par. 2 of the final decree, *id.* at 352.

We submit that the adjudication on the charge of monopolization of the shoe machinery trade carries with it an adjudication of the specific charges as to the lease-only system as practiced by United.

United does not advance its argument by ascribing to Judge Wyzanski the purpose "in directing United to sell as well as lease * * * 'gradually [to] weaken the prohibited market power which [United] now exercises'," Un. Br. 30. Judge Wyzanski in the quoted language was commenting that one of the effects of the sale requirement would be creation of a second-hand market and, he added, "From that market, United will face a type of substitute competition which will gradually weaken the prohibited market power which it now exercises", 110 F. Supp. 350. That, we submit, is far different from a statement of the purpose the District Court had in mind in directing sales as well as leases of machinery, Un. Br. 30. Blending this distortion with the well known rule that relief may go beyond the limits of proven violation—United cites seven cases—United argues that it was fallacious for the courts below to conclude from the future prohibition of sales that the lease-only policy had been condemned, Un. Br. 31. United thereby takes a sentence out of context and completely disregards the specific holdings in the Government case which we have noted, *supra*, pages 16-22. In so far as the cases United cites enunciate the rule mentioned, they differ from the instant case in that the courts there clearly recognized and made explicit that the relief ordered went beyond the violations charged. No such element is present in the Government case.

Although United itself in 1953 correctly stated to this Court that lease-only was regarded in the Government case "as the basic objection to the system," it now seeks

to impose a contrary view on counsel for the United States. No such contrary view is reflected in the colloquy in the course of oral argument on April 26 and 27, 1954 referred to by United, Un. Br. 11-12, 33. (See pp. 5-6, *supra*, and Appendix A). The colloquy obviously relates to leasing as such. The disavowal by Government counsel is of an attack on leasing, not of an attack on lease-only. The difference is one of substance.

In the Government action the Government did not seek to abolish leasing:

> "The Government does not propose that United should cease leasing machines. It does suggest that this Court order defendant to eliminate from the leases those provisions found to be restrictive, to offer for sale every type of machine which it offers for lease, and to make the sales terms somewhat more advantageous to customers, than the lease terms." (110 F. Supp. at 348-349).

The District Court in the Government case did not condemn leasing as violative of the law. Hanover has never contended that it did. What was prohibited in the final decree, among many other matters, was the lease-only policy as practiced by United. That was what the Government attacked, among many other matters. That was what the District Court condemned in that case, among many other matters. That was what Paragraph 5 of the decree explicitly prohibited, 110 F. Supp. 295 at 352.

When Government counsel was insisting that the Government was not asking that "leasing be prohibited" he was surely not abandoning the portion of the final decree that he was defending! His argument was to the contrary.

We submit, again, that both courts below were correct in their view that lease-only as practiced by United was condemned as an unlawful means of monopolization in the Government case.

Next, United declares, Un. Br. 32-33, that no other court has interpreted the final decree in the Government case to mean that lease-only as practiced by United was a violation. Apart from both courts below, only one District Court has had the question squarely before it. That case, *W. B. Coon Co.* v. *United Shoe Machinery Corp.*, unreported, Civil No. 6841 (W.D.N.Y.) April 12, 1963 (A. 267) is no more than a case of failure of proof by a bankrupt plaintiff in a trial that lasted less than a day. It was correctly ignored by the Court of Appeals and put aside by the District Court, see p. 29, *infra*.

Cole v. *Hughes Tool Co.*, 215 F.2d 924 (10th Cir. 1954) *cert. den.* 348 U.S. 927 (1955) is of little aid to United because there Hughes Tool Co.'s lease-only policy was operative in a healthy competitive market and had no exclusionary effect or anti-competitive purpose and retention of ownership was justified in the interest of research activities connected with the leased equipment. We repeat that it was the lease-only system as practiced by United, together with its role in perpetuating an overwhelming dominance of the market that was condemned in the Government case.

II.

Answer to United Brief, Point IC, pp. 33-38, that refusal by the District Court below to certify to the Massachusetts District Court questions of construction of the final decree in the Government case was an abuse of discretion.

United claims error in the denial of its motion before the District Court below for certification to the District Court for the District of Massachusetts of questions as to the interpretation of the final decree entered by that Court on February 18, 1953 in the Government case. (A. 173-178)

245 F. Supp. at 305. The denial of this motion was affirmed by the Court of Appeals below (A. 209-210) 377 F.2d at 790.

The decisions below on this motion were correct.

United's motion was not timely after the adverse decision of the District Court below. The Court of Appeals correctly described the motion as addressed to the discretion of the District Court and held that "in view of the untimeliness of the request for certification, its denial by the court below was not an abuse of discretion" (A. 210) 377 F.2d at 790. The District Court referred to the request as having been made "belatedly" (A. 176) 245 F. Supp. at 307.

United in its brief has not presented grounds to show any abuse of discretion that calls for intervention by this Court. United talks about a delay of six weeks, Un. Br. 37. Rather its delay was one of years. The question of the construction of the final decree in the Government case was presented in this case from the outset. United contended throughout that this final decree had not adjudicated the illegality of United's lease-only policy and that it was not, therefore, prima facie evidence in support of Hanover's claim. Hanover at all times took a contrary view, as it does now before this Court. United now asserts that this issue presented "the pivotal question", Un. Br. 34, yet United took no step until that question had been decided adversely to it.

United had a choice. It might have, at an early stage in proceedings before the District Court, sought a stay of further proceedings before that court, while it made application to the District Court in Massachusetts for a construction of the final decree. See *United States Gypsum Co. v. National Gypsum Co.*, 352 U.S. 457, 462 fn. 14 (1957) as to stay procedure in a situation different from the Hanover case. Such an application could not have been denied as untimely whatever other difficulties it presented. The chief

difficulty of even a timely motion for certification of a question to another federal District Court would surely be that such a procedure is unknown to the Federal Rules of Civil Procedure* or to federal practice. Even if such a novel procedure had been undertaken by United, the District Court in Pennsylvania would scarcely be bound by the views, whatever they might be, of the District Court in Massachusetts. It was the duty of the District Court in Pennsylvania to decide the case that was properly before it and it can surely not be found to have erred in failing to seek the advice of another District Court on one of the points, however important, that was before it.

United, however, chose to await the decision of the District Court. Then, when confronted with an adverse decision, it took action.

Hanover submits that the request is now clearly "untimely." In any event, even if it had been timely, it was no error to deny this novel application on the merits. It is not an appropriate task of District Courts to seek advice from each other and a procedure to accomplish this is unknown to our federal judicial system.

United contends that the "need" for certification might never have arisen because United might have prevailed. But in that event one must suppose that Hanover in its turn would have felt a "need" for a different decision and, if United's view of the law is correct, Hanover, too, could have demanded that Judge Sheridan recant and certify. United simply argues for a rule that would give the loser in private antitrust litigation two chances to persuade. If it loses before one District Court it is to be given another chance before another District Court. We

* The only certification procedure between courts in the federal system is the certification of questions by a court of appeals to the Supreme Court under Judicial Code § 1254 (3).

regard this as offensive to orderly judicial procedure and as no more than an effort by United to lift itself by its own bootstraps in an effort to create a procedure where none exists. If anything it is an argument against creation of such a procedure, at least in the situation here presented.

We submit that there was no abuse of discretion by the courts below in denying certification to United.

In any event, the District Court, after full argument, properly exercised its discretion in denying the motion.

(a) The District Court stated in its supplemental opinion that United's various contentions as to the interpretation of the final decree in the Government case had all been "urged upon and considered by this court prior to its decision" (A. 174) 245 F. Supp. at 306.

(b) The District Court in the same supplemental opinion again stated its view of the decision in the Government case:

> "This court found that in the Government case the court held that United had monopolized trade in shoe machinery during the statutory period; and that the lease-only system was a monopolistic practice by the aid of which United maintained its monopolistic position. This court then concluded that United had a duty to abandon that policy or, to put it in another way, to refrain from illegal trade practices" (A. 174) 245 F. Supp. at 306.

and referred to the extended discussion of this point in its original opinion (fn. 22, A. 174) 245 F. Supp. at 306.

The District Court concluded that "there is nothing in the decree itself which compels a different conclusion" (A. 174) 245 F. Supp. at 306.

(c) United makes much of an application it made directly to the District Court for the District of Massachusetts, prior to its motion below, for construction of the final decree and

of remarks made by Judge Wyzanski in denying that application at a hearing on May 28, 1965.* Since the application was denied (A. 148-150), the District Court below might properly have put aside the transcript of the colloquy and not joined with United in its effort to discern what Judge Wyzanski's unexpressed thinking might have been.

Judge Sheridan below, however, joined in the search and found nothing in the colloquy "to cause this court to change its construction of the decree or to certify questions regarding its construction to the District of Massachusetts" (A. 176) 245 F. Supp. 258 at 307.

United finds the decision below denying certification to be "in square conflict" with this Court's holding in *United States Gypsum Co.* v. *National Gypsum Co.*, 352 U. S. 457, 463-64, Un. Br. 34. That case, however, did not involve certification but rather the exercise of power by the court that had entered an antitrust decree under the jurisdiction retained by it in the decree, 352 U. S. at 463. It is hard to understand how this has any bearing on the issue here which involves no more than the power of the District Court below to construe the final decree entered in Massachusetts.

United next urges that there is conflict between the construction given to the final decree by the District Court below and by the District Court for the Western District of New York in *W. B. Coon Co.* v. *United Shoe Machinery Corp.*, unreported, Civil No. 6841, (W. D. N. Y.) April 12, 1963 (A. 267). As already mentioned, *supra* p. 25, that case involved no more than a failure of proof by a bankrupt plaintiff in a trial lasting less than a day. Judge

* United fails to mention that, when Judge Wyzanski denied its application, he said:

"In the first place, this application comes rather late with respect to the particular Hanover Shoe Company litigation and also with respect to other litigation raising many of the same questions." (A. 149)

Sheridan correctly put aside the *Coon* case in his Supplemental Opinion, pointing out that the deficiencies in proof in the *Coon* case had been supplied in Hanover's case.*

Finally, United seeks support for its argument in the limited availability under statutes of a few states of certification of state law questions by federal appellate courts to state courts, Un. Br. 35. Statutory law in Florida and in a few other states authorizes courts of the state to answer federally certified questions. Three of the cases cited by United, Un. Br. 35, involved certification pursuant to a Florida statute authorizing such procedure.** The fourth case*** was one in which a federal court had abstained from decision of a state law question and had directed that action be brought in a state court.

Obviously the few state statutes that permit this procedure are no support for United's effort to create such a power within our federal judicial system. United's *ipse dixit* is no substitute for statute or rule or precedent and none of these exists.

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* "A review of the findings of fact in that case show Coon failed to introduce evidence that it would have purchased machines; that it had the means to do so; that it was dissatisfied with the leasing system; that United's acts caused damage to Coon; that lease prices were excessive; and that computed purchase prices and adjustments would have resulted in a fair and reasonable damage computation. Hanover's recovery is not based on excessive returns to United, and the other deficiencies in proof in the Coon case have been supplied." Supplemental and Amended Findings of Fact, Conclusions of Law and Opinion, as Amended (A. 178) 245 F. Supp. at 307-308.

** *Aldrich* v. *Aldrich*, 375 U. S. 75 and 249 (1963), certification by Supreme Court to Supreme Court of Florida; *Dresner* v. *City of Tallahassee*, 375 U. S. 136 (1963), same; *Clay* v. *Sun Insurance Office Ltd.*, 363 U. S. 207 (1960), same.

*** *England* v. *Louisiana State Board of Medical Examiners*, 375 U. S. 411 (1964).

III.

Answer to United Brief, Point ID, pp. 38-41, that Clayton Act §5(a) gives prima facie effect only to "findings made expressly or by necessary implication in the Government case" and excludes making "lease-only a violation by inference."

Here United argues that before Hanover may rely upon the final decree in the Government case as part of its proof of monopolization "it must establish that the decree and essential findings expressly or by necessary implication hold United's lease-only policy to be monopolization," Un. Br. 40. United adds that it is not enough that "illegality of the lease-only policy is a possible inference from the auxiliary findings in the Government suit," *ibid.*

Whatever may be the significance of these statements, the fact is that there is here no reliance by Hanover on possible inferences, etc. The statute makes the final decree "prima facie evidence." The findings and final decree are explicit and conclusive.

Hanover submits that, as this Court stated in *Emich Motors Corp.* v *General Motors Corp.*, 340 U. S. 558 (1951), it is the task of the treble damage court "to make clear *** the issues that were determined against the defendant in the prior suit," *id.* at 571. In a Government criminal case tried before a jury there are no findings of fact and in such a case the later treble damage court, as in *Emich*, may resort to "portions of the record, including the pleadings and judgment, in the antecedent case as he may find necessary or appropriate to use in presenting to the jury a clear picture of the issues decided there and relevant to the case on trial," *id.* at 571-572.

Where, as here, the treble damage court had before it comprehensive findings of fact and conclusions in the Government case tried before the court without a jury, it may, of course, review those findings and conclusions to secure "a clear picture of the issues decided there and relevant to the case on trial" (*id.* at 572).

Judge Sheridan in the District Court below and the Court of Appeals examined at length the findings, conclusions and decree in the Government case. (A. 35-49, 196-203) 245 F. Supp. at 266-272, 377 F.2d at 784-787. The Court of Appeals referred to the important policy of the Clayton Act, § 5a to lighten the burden on private antitrust plaintiffs and added that "It is in harmony with that policy to give prima facie effect to any fact which the findings or the opinion fairly show was actually adjudicated in the Government case." (A. 197-198) 377 F.2d at 784.

The pleadings and findings give point and substance to the terms of the final decree. When these are examined it becomes explicit that United's lease-only policy was put in issue and adjudicated in the Government case and that the final decree was designed to prohibit the continuance of that policy. We do not repeat here our discussion of these points, *supra* pp. 16-23.

IV.

Answer to United Brief, Point IE, pp. 41-43, that Hanover was not within the "target area" of United's violation and may not, therefore, rely upon the final decree in the Government case.

Here United argues that Hanover was not within the "target area" of the violations of law found in the Government case. The argument is that United's violations "hampered United's competitors" and did not injure Han-

over or other shoe manufacturers, Un. Br. 41. It follows, United argues, that the final decree in the Government case may not be used by Hanover in support of its claim.

Hanover submits that the "target area" point is not one of the questions presented by United nor is it "fairly comprised" as a "subsidiary question" in any of the questions presented within Rule 40 1 (d) (1) of the Rules of this Court. We submit that this Court should, therefore, disregard this "target area" point.

Nonetheless, we present our answer in the event that this Court should deem this point to be properly before it.

Both courts below ruled against United on this point and stated reasons that we submit have not been overcome in United's brief. The District Court met United's argument that only competing shoe machinery manufacturers were within the target area of United's monopolization by pointing out that:

> "The stifling of the business of competing shoe machinery manufacturers was a direct object of United's actions, but it was not the only object. It permitted United to deal with shoe manufacturers on United's terms, and the terms in turn permitted United to stifle the competition. The monopolistic terms, such as the lease-only system and the related clauses and practices, caused both the injury claimed by Hanover and the injury to United's competitors. There is nothing strange about an actor having more than one immediate object of his acts. The aim was wide enough to accomplish both. Hanover was 'aimed' at and 'hit,' the test of Karseal"* (A. 54) 245 F. Supp. at 275.

The Court of Appeals reached the same conclusion:

> "Here, . . ., the cost to the customer of doing business was increased as a result of the monopolist's conduct.

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* The reference is to *Karseal Corp.* v. *Richfield Oil Corp.*, 221 F.2d 358 (9th Cir. 1955) which we discuss *infra* fn.* pp. 34-35.

> The consequences of the injury therefore were direct and the cause of action under the narrowest construction of § 4 was made out. In the context of the relation of machinery monopolist and customer manufacturer no more direct injury could be inflicted" (A. 196) 377 F.2d at 783-784.

It is hard to find a more direct business relationship than that between manufacturer and customer. Hanover, the customer, has proved injury by the machinery monopolist. It is hard to know what more is to be expected of it.

Both courts below relied upon *Chattanooga Foundry and Pipe Works* v. *City of Atlanta*, 203 U.S. 390 (1906). In that case plaintiff City of Atlanta purchased pipe at an excessive price due to an illegal agreement between defendant and others. In that case, as in Hanover's case, the damages sought were the higher business costs resulting from the violation of the antitrust laws. The District Court held that "the cases cannot be distinguished" (A. 51-52) 245 F. Supp at 274 and the Court of Appeals agreed (A. 196) 377 F.2d at 783.

The cases principally relied upon by United are wide of the mark.*

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* In *Conference of Studio Unions* v. *Loew's, Inc.*, 193 F.2d 51 (9th Cir. 1951), *cert. denied*, 342 U. S. 919 (1952), Un. Br. p. 41, plaintiff union and its individual members sought to recover damages from a group of motion picture producers and a rival union resulting from an alleged conspiracy on the part of the defendants to injure independent producers, not parties to the litigation. The basis of the claim was that the injury to the independent producers resulted in a loss of revenue to the plaintiff unions and of wages to the individual plaintiffs. Recovery was denied on the ground that the alleged injuries were incidental and remote. It is hard to understand how the relation between Hanover and United could be more direct.

In *Productive Inventions, Inc.* v. *Trico Products Corporation*, 224 F.2d 678 (2d Cir. 1955), *cert. denied*, 350 U. S. 936 (1956), Un. Br. p. 42, a patentee was held not to be a person injured in his business or property in an action he had brought against a competitor of his exclusive licensee, claiming treble damages against the competitor for loss of royalties on sales that might have been made

United argues that "United's leases had an exclusionary impact only upon United's competitors, . . . derived largely from the benefits they conferred on United's customers, the lessees . . ." Un. Br. 42. If so, we submit that this enabled the monopolist to attain and maintain its position and to enjoy that position in relation to its customers. If a customer, such as Hanover, can prove injury, as it has, it is hard to understand what more it must do.

It is not true, however, that United conducted its monopoly for the benefit of shoe manufacturers. United's attempt to read the Government case as putting "Hanover, like other shoe manufacturers . . . outside the ambit of the violations found . . ." Un. Br. 42 is answered by the District Court in holding that:

> ". . . Hanover's injury flows proximately from the monopolization. The complaint in the Government case listed the effects of the monopolistic practices on the shoe manufacturers, as well as on United's competitors.

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by the exclusive licensee save for the competitor's alleged antitrust violations. The patentee's antitrust complaint was dismissed. This decision has no bearing on the present case where the relations between the parties and the damage suffered by Hanover are both as direct as anything can be.

Karseal Corp. v. *Richfield Oil Corp.*, 221 F.2nd 358 (9th Cir. 1955), Un. Br. p. 42 did not involve the customer relationship present here. It involved, rather, an action by a manufacturer against a competing manufacturer. Richfield, the defendant manufacturer, had applied restraints to capture the independent gas station market. Plaintiff Karseal, on the other hand, sold its products to distributors while defendant Richfield sold direct to the independent gas stations. It was held that this was immaterial. Karseal was within the target area. It was "aimed at" and "hit," regardless of its different marketing method. The question was whether the manufacturer of a product, who himself did not sell direct to gas station customers but sold to distributors who might sell to such customers, was also within the target area and it was held that he was.

It is hard to understand why United cites *Karseal* in support of its position. Here the relationship between manufacturer and customer is more direct than between competitors in *Karseal*.

> One of the effects on the lessees was United's extraction of large sums of money in excess of the reasonable value of machinery and of the service rendered by United. A similar charge is included in Hanover's complaint. Judge Wyzanski found that United's policies have '. . . not necessarily promoted in the *shoe manufacturing* field the goals of a competitive economy and an open society.' He pointed out that if United shoe machinery were available on a sale basis, United's psychological and economic control over shoe manufacturers would be released, which in turn would cause some shoe manufacturers, for financial and psychological reasons, to be more willing to dispose of United's machines and take on either competitors' machines or United machinery available in a secondhand market. It is obvious that the financial considerations were that some manufacturers would find it less costly to own than to lease machinery. Thus, a charge and finding of detriment to a particular class of person, as seemingly required by Eagle Lion Studios, is present" (A. 53-54) 245 F. Supp. at 274.

Further:

> "It is clear that a shoe manufacturer is '. . . within that area of the economy which is endangered by a breakdown of competitive conditions . . .' in the shoe machinery industry" (A. 54) 245 F. Supp. at 275.

The Court of Appeals agreed (A. 196) 377 F.2d at 783-784.

It is difficult, we submit, to imagine any group that could be more directly affected by United's monopolization than its customers, of which Hanover was one.

That there was ample basis for these conclusions of the Courts below is apparent from the detailed findings of the District Court in the Government action as to the effects produced on shoe manufacturers by United's lease-only monopolization, 110 F. Supp. at 323-325.

V.

Answer to United Brief, Points II A and II B, pp. 43-52, that it would be "especially unjust" and "grossly unfair" to United to apply the Government case retroactively.

Under this Point II United takes on what, we submit, must be a heavy burden to show that a decision of this Court should be given anything but the full application given to other decisions. We would put decisions under the Sherman Act in no special category. We submit that United has fallen far short of making a showing that warrants special treatment for it through departure by this Court from its regular practice in antitrust cases. This point has special emphasis where, as here, a special treatment of the decision of this Court in the Government case would bar application of the remedy provided by Congress to one injured in his business.

The thread that runs through this section of United's brief is that it would be "especially unjust" and "grossly unfair," Un. Br. 49, 52, to subject United to treble damages. This plea is made to escape liability and to permit United to retain its gains by barring recovery by a private party who has met the requirements of the Clayton Act of proof of violation of the Sherman Act and of injury. No precedent is cited in which a plea of this kind has been recognized as relevant and appropriate. On its face United's plea is suspect. Hanover submits that it should be rejected.

First, United tries to show that this Court "had approved the features of United's leases which the Government suit attacked," Un. Br. 43. The answer to this plea, a plea

not accepted in the Government case,* is that in not one of the three earlier cases relied on by United was the lease-only policy in issue. United misleads when it refers to "this Court's approval of its lease-only policy," as it does in Un. Br. 47.

It is simply not true that of the three United cases which reached this Court prior to the Government case "only the second dealt with the lease-only policy" and "that case upheld the policy," Un. Br. 46. This statement is not only untrue but is contradicted by the correct statement on p. 44 of its brief that the District Court in the second case** stated that "the Government had abandoned during the trial its contention that the lease-only policy itself was unlawful."

United follows this, Un. Br. 45, with an excerpt from the opinion of this Court in the second case that is misleading because United has omitted words that, if included, would have wholly changed the meaning. United quotes and italicizes the words, *"The evidence disproves this,"* implying by relating them to the preceding words that they refer to United's leases. The omitted words show that "this"

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* In its answer in the Government case, *United States* v. *United Shoe Machinery Corporation,* 110 F. Supp. 295 (1953) United pleaded the second decision as "a complete defense in bar" to the Government action and the third decision as a partial bar. See Answer of United in Government case, Third Defense pp. 64-69, and Fourth Defense *id.* pp. 69-74. The District Court in the Government case does not seem to have mentioned these pleas in its lengthy opinion. On the argument before this Court United abandoned them, as is shown in the following colloquy:

"Justice Reed: I am a little uncertain as to just why you refer so frequently to former decisions. Of course you are not claiming those are res adjudicata.

"Mr. Proctor: No, sir."

Transcript of oral argument in *United Shoe Machinery Corporation* v. *United States*, October Term 1953, No. 394, p. 25.

** *United States* v. *United Shoe Machinery Co.*, 222 Fed. 349, 352 (D. Mass. 1915).

refers to the immediately preceding words that ". . . the restraint is said to have been the initial conception of the company and the purpose of its organization."* That is quite different from the impression United seeks to convey as to what this Court said in this decision.

In Hanover's brief in No. 335, pp. 33-37, we show that United's long standing exclusionary lease-only policy and practice "was not in issue in any of the cases until the United States filed its complaint in the Government case in 1947." In the Government case, as we point out pp. 16-23 *supra*, lease-only was put in issue in the complaint, was adjudicated as illegal and was ordered to be discontinued in the final decree. It is this final decree that Hanover relies upon as prima facie evidence of monopolization. This evidence is in no way weakened by the earlier second case in which lease-only was not in issue.

United makes a further argument that we do not comprehend. It refers, Un. Br. 46, to the third case and again states correctly that the Government did not attack the lease-only policy in that case. United then adds that ". . . the district court . . . held the full-capacity clause, among other provisions, lawful, thereby necessarily upholding the

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*The full quotation is as follows with the omitted words in brackets:

"The evil potency ascribed to the leases (we use the word as inclusive of the clauses and we do not think it necessary to distinguish them according to their application to particular machines) by the Government is their asserted coercion of shoe makers and machinery makers. They limit the freedom of the first, it is contended, and by that limitation preclude the competition of the second with the defendants. [In other words, the use of the machines of the United Company is compelled as against the use of machines of other manufacturers, resulting in the restraint of the trade of the latter. To this charge all other charges are subsidiary, and the restraint is said to have been the initial conception of the company and the purpose of its organization.] The evidence disproves this. . . ." *United States* v. *United Shoe Machinery Co.*, 247 U. S. 32 at 63 (1918).

lease-only policy." * We are unable to follow such a palpable non sequitur.

Much the same argument is made, Un. Br. 45, with respect to the second case. It is there said that ". . . approval of the clauses necessarily implies approval of the lease-only policy since it would be unnecessary to consider specific clauses if lease-only as such were illegal." The action of the District Court in the Government case furnishes a complete answer. It found it necessary to deal with both the issue of lease-only and the restrictive clauses and practices that were attacked, 110 F. Supp. 295 at 344. By its order, it purged the leases of their restrictive features, *id.* at 349, final decree par. 6, *id.* at 352 and ordered that United "shall not offer for lease any machine type, unless it also offers such type for sale," *id.* par. 5 at 352.

United follows the above argument with an oblique suggestion that, under *Hartford-Empire Co.* v. *United States*, 323 U.S. 386, page 412, fn. 10 (1945), a lease of a patented machine is a lawful method of exercising a patent right. Again, we do not understand this argument because the District Court in the Government case found, as to United's patents:

> "It is, however, plain that most of the patents on the fundamental inventions have expired, and that most existing patents do not technically prevent the accomplishment of the same result in another way. Thus, it is clear that United's present dominance does not rest primarily on patents." 110 F. Supp. 295 at 333.

Surely, in the face of this finding, United may no longer contend that lease-only is in some way justified under its

* We have pointed out in our brief in No. 335, pp. 37-38, that (a) in the third case the full-capacity was upheld on its face without any inquiry as to how it was used by United and (b) in the Government action it was found to have been used by United with anti-competitive effects.

patent position. The finding quoted above is clear enough that United no longer has any such position.

In this section and elsewhere in its brief United conveniently confuses lease-only with provisions in the leases. To purge or not to purge a lease of restrictive clauses is surely not the same as dealing with a lease-only policy. Lease-only gives full effect to the operation of the restrictive clauses and is the cement that binds together the violation.

If only the restrictive provisions and policies were violative of the law, all the Court need do would be to strike them but, as United's counsel recognized in its argument in this Court in the Government case, supra p. 6, App. A pp. 1a-2a, it was also the lease-only policy which the Government case attacked and which the decree therein abolished with the approval of this Court.

Next, Un. Br. 46-48, United builds on its previous point that this Court had already approved its lease-only policy at the time of the decision of this Court in *American Tobacco Co.* v. *United States*, 328 U.S. 781 in 1946. United then argues that, due to this claimed earlier approval, the decisions in the *Alcoa** and *American Tobacco* cases gave to United no fair warning that the earlier approval had been undermined. Hanover reiterates that United's lease-only policy was not in issue and thus had not been approved by this Court in any of the three earlier decisions.

In its final plea, United complains of the retroactive application of "a change in the law," Un. Br. 49, and attempts to support its argument by reference to decisions such as *Simpson* v. *Union Oil Co.*, 377 U.S. 13 (1964), to overruling decisions and to situations of reliance on an earlier rule.

In Hanover's brief in No. 335, pp. 31-32, we discuss the inapplicability of the decision in *Simpson* which was a case of a clear change of a rule. At pp. 27-31 of that brief we show that no new rule of antitrust law was announced in

* *United States* v. *Aluminum Co. of America*, 148 F.2d 416 (2d Cir. 1945).

the decision of this Court in *American Tobacco Co.* v. *United States*, 328 U.S. 781 (1946). We point out that United, with a market share ranging from 89% to 100% of the 20 major machine types in the shoe machinery trade combined with its long standing exclusionary lease-only policy and the restrictive provisions of its leases was on ample notice, under antitrust decisions of this Court long antedating the commencement of the period of the applicable statute of limitations and long antedating the 1946 decision in *American Tobacco*, that its antitrust position was, to understate it, precarious and exposed to attack.

There are no overruling decisions in Hanover's case, as United argues, Un. Br. pp. 50-51.

There can be no claim here of "reliance" by United upon some earlier rule of law. There is not a scrap of evidence in this record on that point. There is no claim in this record of reliance by United on counsel,* such as there was in the testimony of counsel in *Simpson* v. *Union Oil Co.*, 270 F. Supp. 754 (N.D. Cal. 1967) and in the finding of reliance for 30 years on the earlier *General Electric* decision of 1926, 272 U.S. 476 in *Lyons* v. *Westinghouse Electric Corp.*, 235 F. Supp. 526, 535-536 (S.D.N.Y. 1964).

A decision such as *Gelpcke* v. *City of Dubuque*, 68 U. S. 175 (1863), Un. Br. 51, is wide of the mark. There an overruling state decision would have invalidated bonds issued and purchased in reliance upon the overruled decision. There is no overruling decision in Hanover's case. There is not even "a new rule of antitrust law" that caught United unawares in 1946.

United makes much of recent decisions of this Court in criminal cases in which newly announced constitutional rules were denied retroactive application. It seeks support in these decisions to limit the 1955 decision of this Court in the Government case to prospective application only.

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* On the contrary, as shown in the colloquy quoted in footnote * p. 38 *supra*, United's counsel disclaimed any such "reliance" more than thirteen years ago.

We see no need for a detailed analysis of the three recent constitutional decisions, principally relied on by United, Un. Br. 50-51.

First, *Johnson* v. *New Jersey,* 384 U.S. 719, 728 (1966), Un. Br. 50, in which this Court declined to apply retroactively either the rule of *Escobedo* v. *Illinois,* 378 U.S. 478 (1964) that a confession given after an accused person has unsuccessfully asked to see his lawyer inadmissible, or the rule of *Miranda* v. *Arizona,* 384 U.S. 436 (1966), that a confession given by an accused person who has not been warned of his right to see counsel is inadmissible.

Second, *Tehan* v. *United States ex rel. Shott,* 382 U.S. 406 (1966), Un. Br. 50, in which this Court declined to apply retroactively the rule announced in *Griffin* v. *California,* 380 U. S. 609 (1965), that a state prosecutor or judge violated due process if he commented on a defendant's failure to testify in his own behalf.

Third, *Linkletter* v. *Walker,* 381 U.S. 618, 629 (1965), Un. Br. 50, 51, in which this Court declined to give retroactive application to the rule announced in 1961 in *Mapp* v. *Ohio,* 367 U.S. 643, that evidence obtained by an unconstitutional search by State officers might not be admitted in a State trial.

In all of these constitutional decisions this Court, we submit, was concerned with the avoidance of disruptions in the administration of our criminal law from newly required or inhibited procedures together with full regard to the interests of persons accused or on trial. The important issue of retroactivity in this constitutional sense is a far cry from Hanover's case.

Hanover submits that United's plea of special injustice and gross unfairness has no place in Hanover's action for treble damages against a monopolist. Hanover, we repeat, has proved monopolization and the injury to its business during the period of the applicable statute of limitations.

It is entitled to recover. We note again that United has cited no precedent that would even justify consideration of such a plea in a treble damage action.

VI.

Answer to United Brief, Point III A, pp. 52-56, and to Point IV A, p. 61, that Hanover sustained no injury because it would not have bought the machines and because cost of capital considerations show that Hanover sustained no loss by leasing.

United argues that the testimony of expert witnesses as to "cost of capital" was erroneously disregarded by both courts below and that if Hanover had taken "cost of capital" into account in reaching a decision to buy or lease shoe machinery "Hanover would not have bought if it could," Un. Br. 56.

There are many answers to these contentions in the findings of the District Court, accepted by the Court of Appeals and not challenged by United:

1. The finding, based in part on the testimony of United's expert:

> "Hanover had sufficient finances to purchase. It had ample working capital. During 1939 and 1940 its current and total liabilities were minimal in relation to current assets, and even to quick assets. United's expert, Dr. Corson, a management consultant on problems of economics, marketing, finance, personnel administration and organization, testified that Hanover had sufficient funds to purchase the machinery here in question without borrowing additional capital. If it had borrowed in 1939, its financial condition was such that the interest would have been at the then prime rate of 1½ percent, or at most 2 percent" (A. 79-80) 245 F. Supp. at 286.

2. The finding:

> "Hanover has proved that as a consequence of United's monopolization it was unable to purchase most of the more important machines which it would have purchased had they been available" (A. 81) 245 F. Supp. at 287.

The detailed supporting findings are at (A. 64-81) 245 F. Supp. at 279-287.

3. These findings were accepted by the Court of Appeals, which concluded:

> "The court below found that 'Hanover has proved that as a consequence of United's monopolization it was unable to purchase most of the more important machines which it would have purchased had they been available,' 245 F. Supp. at 287. This finding negatives any inference of acquiescence in the United leasing system. The finding in the Government case of the existence of the monopoly and of United's policy against sales, the participation of Mr. Sheppard, Hanover's president, in the effort of a trade association of which he was president to persuade United to offer more of its machinery for sale and Hanover's purchase of machinery from United when it first became possible to do so by virtue of the Government decree, sufficiently support the finding by the court below and forbid our declaring it to be clearly erroneous" (A. 189-90) 377 F.2d at 781.

Against the foregoing, United's claim that the courts and Hanover should have considered "cost of capital" is hollow and empty.

The District Court defined "cost of capital" as "an economic concept which has been defined as 'the rate of return expected by investors on capital funds they place at . . .

[a concern's] disposal'" (A. 87) 245 F. Supp. at 289-290, and then, after a full review of the testimony of the experts (A. 87-92) 245 F. Supp. at 290-292, concluded:

> "On the record there is no clear measurement for cost of capital. Even if measurable, it is not a proper element of the damage calculation. Cost of capital is a guide, not rigid or inflexible, which with other considerations such as opportunity, preference, necessity and the like, may dictate action and policy. Cost of capital, other than interest on borrowed funds, is not an item of cost or expense that would directly affect Hanover's profits and losses in any year. The financial statements and the testimony of Dr. Cyert and Mr. Spence, however, indicate that Hanover would have borrowed the necessary capital for the purchase. The calculations should be adjusted to reflect a 2.5 percent interest rate" (A. 91-92) 245 F. Supp. at 292.

Hanover's damage calculations were adjusted to reflect this interest rate and accordingly interest in the amount of $69,259 was subtracted from the damage award (A. 107, 166) 245 F. Supp. at 299, 302.

The Court of Appeals accepted these findings:

> "The novel concept which United sought to have approved has not yet reached the point of general acceptance even among economists. We agree with the court below that cost of capital is not sufficiently related to actual costs to be included in an antitrust damage calculation" (A. 213) 377 F.2d at 792.

Both courts were correct in rejecting United's economic theories, which disregarded Hanover's ample supply of funds and its ability to borrow (A. 89) 245 F. Supp. at 291, and which would have had no effect on Hanover's demonstrated damages.

In its brief before this Court, United argues, Un. Br. pp. 54-55, that both United and National Shoe Manufacturers Association (N.S.M.A.) of which Hanover was a member

"accepted the cost of the capital" as a necessary element in negotiations required under par. 9 of the final decree in the Government case on a plan for terminating outstanding leases and providing an option to the lessee shoe manufacturers to buy the machines. Even if this were correct, it does not follow that "cost of capital" is therefore relevant in damage calculations. It is not, however, correct. The District Court found that both United and N. S. M. A. rejected completely the concept of "cost of capital" advocated by the experts:

> "Mr. Salinger, a United witness, testified that prices were arrived at 'on a purely bargaining position' without regard to costs, values or any so-called 'equivalency formula.' To facilitate agreement, the economic experts, all of whom argued for cost of capital, were finally excluded from the negotiations. There is no evidence that Mr. Sheppard [president of Hanover], although a member of the N. S. M. A. negotiating committee ever agreed with the cost of capital concept" (A. 96-97) 245 F. Supp. at 294.

The simple fact is that the "cost of capital" for which United argues is not and would not have been a cost to Hanover which would affect the damage calculations. The District Court gave full effect to the only cost of capital Hanover would have incurred, the interest it would have had to pay on the funds it would have borrowed to buy the machines. Dr. Corson's theoretical "cost of capital" over and above such interest payments has no relevance to Hanover's damage calculations.

VII.

Answer to United Brief, Point III B, pp. 57-60, that a condition precedent to Hanover's recovery is prior demand to buy and Hanover failed to make such a demand of United.

United here argues that Hanover is barred from asserting injury because it failed to demand that United sell to Hanover United's principal machines offered only on lease. United seems to be pressing this point as a point of law because no finding of fact is challenged under Rule 52(a) of the Federal Rules of Civil Procedure as "clearly erroneous." However, we deem it essential to state the findings below on this point.

The District Court found, in the course of a comprehensive review of the impact of the monopolization on Hanover (A. 64-81) 245 F. Supp. at 279-287:

> "Hanover never asked United if it could buy the lease-only machines. Neither did it protest its inability to buy. Mr. Sheppard testified that any such request would have been a 'foolish question.' This explanation does not seem unreasonable in view of the findings in the Government case and the evidence in this case" (A. 66) 245 F. Supp. at 280.

The findings in the Government case to which the District Court referred include the finding that "The more complicated machines, those producing the largest revenue, and those of more importance for the shoe manufacturer are offered only for lease" (110 F. Supp. 295, 314; also at 340). The practice of leasing shoe machinery had been "continuously used by United and most of its American competitors" (110 F. Supp. 295, 314).

Turning to the evidence in this case, the District Court found that "not only Mr. Sheppard [president of Hanover] but representatives of the whole shoe machinery industry apparently thought that they were captive customers of United" (A. 66) 245 F. Supp. at 280. This finding is not challenged nor are other findings that since the 1920's Hanover "was actively engaged in a search to buy non-United Goodyear welt shoe machinery" (A. 65) 245 F. Supp. at 280, that Hanover's President, Sheppard, took part in a trade association effort "to search for and disseminate information on modern non-United shoe machinery * * * and to persuade United to offer more of its machinery for sale" (A. 65-66) 245 F. Supp. at 280, and that Hanover bought machinery from United at the first opportunity following the availability of machinery for purchase under the terms of the final decree in the Government case (A. 68-71) 245 F. Supp. at 281-282.

The foregoing findings make it obvious that United gravely errs in saying that the District Court's conclusion "was based solely upon the self-serving testimony of a Hanover officer," Un. Br. 59.

The Court of Appeals accepted the findings of the District Court and held as a matter of law that it would be "ironic as well as idle" to require a demand in the situation shown in this record:

> "The court below found that 'Hanover has proved that as a consequence of United's monopolization it was unable to purchase most of the more important machines which it would have purchased had they been available.' 245 F. Supp. at 287. This finding negatives any inference of acquiescence in the United leasing system. The finding in the Government case of the existence of the monopoly and of United's policy against sales, the participation of Mr. Sheppard, Hanover's president, in the effort of a trade association

of which he was president, to persuade United to offer more of its machinery for sale and Hanover's purchase of machinery from United when it first became possible to do so by virtue of the Government decree, sufficiently support the finding by the court below and forbid our declaring it to be clearly erroneous.

"The question remains, however, of the necessity of a formal demand for the purchase of machines during the damage period. On this issue the court below found: 'Hanover never asked United if it could buy the lease-only machines. Neither did it protest its inability to buy. Mr. Sheppard testified that any such request would have been a "foolish question." This explanation does not seem unreasonable in view of the findings in the Government case and the evidence in this case.' 245 F. Supp. at 280.

"Hanover was, as the court below found, along with the entire shoe machinery industry, a 'captive customer' of United. What the witness characterized as foolish amounts to a futile gesture which the law does not require. Hanover had been a customer of United in the leasing of machinery for many years. It was well aware of United's power as the supplier of machinery and of its policy against sales. In such circumstances it would be ironic as well as idle to require the victim of the monopoly to make an explicit demand the denial of which was implicit in the continuance of the monopoly. See *Continental Ore Co.* v. *Union Carbide & Carbon Corp.*, 370 U.S. 690, 699 (1962)" (A. 189-190) 377 F.2d at 781.

We further submit that, despite United's effort to distinguish it in its brief, Un. Br. 60, the decision of this Court in *Continental Ore Co.* v. *Union Carbide and Carbon Corp.*, 370 U.S. 690 (1962) is controlling on this point.

In that case, Continental sued Union Carbide and others for damages resulting from the latter's illegal monopolization of the vanadium oxide market. The jury found for the defendant and the verdict was affirmed by the Court of

Appeals for the 9th Circuit, 289 F. 2d 86 (1961). The Court of Appeals reasoned that since Continental had not actually requested that defendants sell it vanadium oxide nor sought to purchase it from all other possible sources, it had not established that the illegal monopolization was the cause of its injury.

This Court reversed and remanded the case for further trial:

> "Furthermore, we do not believe that respondents' liability under the antitrust laws can be measured by any rigid or mechanical formula requiring Continental both to demand materials from respondents and to exhaust all other sources of supply. The Court of Appeals appears to have accorded no weight to Continental's evidence which was offered to show that respondents had interfered with, acquired, or destroyed the several small independent sources of vanadium oxide relied upon by Continental. Under the criteria used by the Court of Appeals, respondents could, with impunity, concertedly refuse to deal with Continental while the latter was able to obtain some oxide from independent sources, then proceed at their leisure to dry up those other sources, and finally insist that Continental make repeated demands for respondents' oxide before incurring antitrust liability. The cases relied upon by the Court of Appeals clearly do not support any such formula," 370 U. S. at 699.

A "rigid or mechanical formula" that requires an empty demand to the effect that a monopolist cease monopolizing surely has no place in Hanover's case. Hanover's president, Sheppard, testified that a request to buy would have been a "foolish question," (A. 66) 245 F. Supp. at 280. The District Court, under the circumstances here present, found this explanation not unreasonable (A. 66) 245 F. Supp. at 280. The Court of Appeals aptly characterized a demand

in the situation presented in this record as "a futile gesture which the law does not require" (A. 190) 377 F. 2d at 780-781.

In support of its claim of the need for prior demand United cites, as it did to the courts below, eight motion picture cases, Un. Br. 57.

Two of them were distinguished by this Court in the Continental Ore case.* All are distinguishable because in all the defendants are charged with a conspiracy to deprive the plaintiffs of films. In such cases, a plaintiff must show that he wants the films. If he did not, he remains a stranger and is not in a position to complain. If he did, he becomes one who seeks to do business and he may go forward with proof of conspiracy, etc. The requirement of a demand is an obvious essential in this type of case.

In the present case, however, Hanover was for many years a customer of United and used United's machines in the only way it could get them. The complaint is that it was deprived by a monopolist's lease-only policy of the opportunity to buy machines. Hanover was well aware of that policy. So was United — it had established it.

It is naïve to suppose, as United argues, that, absent a demand, Hanover could not have been injured or damaged. Both injury and damage were present, demand or no demand, as both courts below found.

While United rejects the holding of the Court of Appeals that the *Alcoa* and *American Tobacco* cases effected a change in the law, Un. Br. 46-48, it argues that, if those cases apprised United of such a change, a demand by Hanover after them "cannot be presumed futile," Un. Br. 59.

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* See fn. 8, 370 U. S. at 699 in which *Royster Drive-In Theatres* v. *American Broadcasting-Paramount Theatres, Inc.*, 268 F. 2d 246, 251, *cert. denied*, 361 U. S. 885 and *Milwaukee Towne Corp.* v. *Loew's, Inc.*, 190 F. 2d 561, 568, *cert. denied*, 342 U. S. 909 are cited as not supporting any formula that demands must be made.

The short answer is that *Alcoa* and *American Tobacco* did no more than apply rules established both by the Sherman Act and by this Court long before they were decided, as is pointed out in Hanover's brief in No. 355, pp. 27-31. In short, there was no change in the law. Nor was there any change in United's monopoly. It was the same in 1939 as in 1945 and 1946 and in 1953 and until 1955 when, pursuant to this Court's affirmance of the decree in the Government case, its adverse effects on United's customers were finally ended.

VIII.

Answer to United Brief, Point IV B, pp. 61-66, that Hanover sustained no damage because "any excess cost of leasing over cost of ownership was not absorbed by Hanover but passed on to others."

Here United raises once more the defense that Hanover suffered no damage to its business or property under the Clayton Act because it operated at a profit and thus recouped, in the sale price of the shoes it sold, the entire cost of the shoe machinery that it leased from United during the damage period. This "passing-on" defense was separately tried under Rule 42(b) of the Federal Rules of Civil Procedure as an issue that might be dispositive of the case. Hanover prevailed before the District Court, *Hanover Shoe, Inc.* v. *United Shoe Machinery Corp.*, 185 F. Supp. 826 (M.D. Pa.), the Court of Appeals affirmed *per curiam*, 281 F. 2d 481 (3d Cir.) and this Court denied certiorari, 364 U.S. 901 (1960).

This issue is now before this Court in the grant of United's cross-petition.

The late Circuit Judge Goodrich sat in the District Court on the separate trial. This separate trial proceeded on two stipulated assumptions: (1) that United had violated the antitrust laws and (2) that the excessive cost of shoe machinery existed, as Hanover alleged, 185 F. Supp. at 828. Based upon these assumptions, Judge Goodrich held, as a matter of law, that "the causal relation between defendant's wrong and plaintiff's harm is obvious," *id.* at 829.

The point is self-evident.

Plaintiff was a customer of defendant. It was a lessee of defendant's shoe machinery. It was the ultimate consumer of defendant's products — the use of shoe machinery. Actually, defendant owned all the leased machinery. Plaintiff was a lessee.

Judge Goodrich next dealt with United's legal argument that it was relieved of liability "because the plaintiff passed on its loss to its customers" and held that:

> "The plaintiff's injury occurred when it was charged too much for the machinery. If it had not thus been illegally charged for machinery it would have had more money to pay out in dividends, or to engage in a further development campaign to sell its shoes, or to raise the wages of its employees, or to enlarge its bank account as protection against a rainy day, or for all of these things. The plaintiff against whom a tort is committed has his cause of action at the moment that the tort occurs." 185 F. Supp. at 829.

Judge Goodrich referred to the decision in *Southern Pacific Co.* v. *Darnell-Taenzer Lumber Co.*, 245 U.S. 531 (1918) where Mr. Justice Holmes said:

> "The only question before us is that at which we have hinted: whether the fact that the plaintiffs were able to pass on the damage that they sustained in the first instance by paying the unreasonable charge, and to collect that amount from the purchasers, prevents

> their recovering the overpayment from the carriers. The answer is not difficult. The general tendency of the law, in regard to damages at least, is not to go beyond the first step. As it does not attribute remote consequences to a defendant so it holds him liable if proximately the plaintiff has suffered a loss. The plaintiffs suffered losses to the amount of the verdict when they paid. Their claim accrued at once in the theory of the law and it does not inquire into later events. * * * The carrier ought not to be allowed to retain his illegal profit, and the only one who can take it from him is the one that alone was in relation with him, and from whom the carrier took the sum. * * * Behind the technical mode of statement is the consideration well emphasized by the Interstate Commerce Commission, of the endlessness and futility of the effort to follow every transaction to its ultimate result. * * * Probably in the end the public pays the damages in most cases of compensated torts." 245 U.S. at 533-534.

The Court of Appeals affirmed per curiam on the opinion of Judge Goodrich and referred to it as "thoroughly convincing", 281 F. 2d 481.

The plain and simple fact is that the direct result of United's monopolization of the shoe machinery trade and its exclusionary lease-only policy was to deprive Hanover of the opportunity to enjoy the savings of being able to buy machinery in a free and open competitive market. The fact that, in spite of being deprived of these savings for its shoe machinery, Hanover was still able to make a profit in the retail sale of shoes may be evidence of the competence of its management but is irrelevant to the claim now made. The direct and proximate result of United's monopolization was to require Hanover to pay cash out of pocket that it should not have been required to pay to secure shoe machinery. That is what Hanover seeks to recover. There is

no reason in this case to go beyond this direct and immediate effect of United's monopolization.

To go beyond "the first step" and bar recovery in this case is to reward the wrongdoer at the expense of the victim and to nullify the remedy provided by Congress.

Decisions of this Court and of lower federal courts support the rule stated above.

In *Chattanooga Foundry and Pipe Works* v. *City of Atlanta,* 203 U.S. 390 (1906), this Court approved a verdict for "the difference between the price paid and the market or fair price that the city would have had to pay under natural conditions had the combination been out of the way," at 396. The City of Atlanta was buying pipe for its city water works. No inquiry was made as to whether the city might have or had in fact recovered the amount of the excess cost of the pipe through increased charges for water or increased taxes. The point was irrelevant to the application of the correct rule of damage law.

In *Thomsen* v. *Cayser,* 243 U.S. 66 (1917), plaintiffs as merchants and shippers recovered as damages the difference between reasonable shipping charges and excess shipping charges resulting from a combination in restraint of foreign trade, at 88. Injury was shown in the amount of the overcharge without any inquiry as to whether plaintiffs might have secured reimbursement by adding that amount to the price of the goods to their customers.

See also *Story Parchment Co.* v. *Paterson Parchment Co.,* 282 U.S. 555, 561-562 (1931).

A large number of lower court cases have applied the principles stated in these decisions:

Straus v. *Victor Talking Machine Co.,* 297 Fed. 791, 799, 802-803 (2d Cir. 1924);

Pfotzer v. *Aqua Systems,* 162 F. 2d 779 (2d Cir. 1947);

Peto v. *Howell,* 101 F. 2d 353 at 361 (7th Cir. 1939);

Alden-Rochelle, Inc. v. *American Society of Composers, Authors and Publishers* (ASCAP), 80 F. Supp. 888 at 898 (S.D.N.Y. 1948);

American Crystal Sugar Co. v. *Mandeville Island Farms*, 195 F. 2d 622 at 625 (9th Cir. 1952), *cert. denied* 343 U.S. 957.

United urges, Un. Br. 63, that the decisions below on passing-on are contrary to the rule of three oil jobber cases.* To state these cases is to distinguish them. In all it is recognized that an oil jobber — a middleman — who buys and sells at a guaranteed margin between purchase price and selling price has suffered no damage under the antitrust laws from an alleged conspiracy to fix his buying price.

United further argues, relying on four decisions growing out of the treble damage actions against electrical equipment manufacturers,** that, while they rejected the passing-on defense, such rejection was based on the lack of standing of the customers of the utilities to sue the equipment manufacturers and on the ground that any recoveries would benefit the customers of the utilities through lower rates, Un. Br. 64-65. United has failed to read these cases accurately. All of them are in accord with the prior decision on the separate trial of the passing-on issue in this case and all but *Ohio Valley* cite that

* United cites *Clark Oil Co.* v. *Phillips Petroleum Co.*, 148 F.2d 580 (8th Cir. 1945), cert. denied 326 U.S. 734; *Northwestern Oil Co.* v. *Socony Vacuum Oil Co.*, 138 F.2d 967 (7th Cir. 1943), cert. denied 321 U.S. 792; and *Twin Ports Oil Co.* v. *Pure Oil Co.*, 119 F.2d 747 (8th Cir. 1941), cert. denied 314 U.S. 644.

** *Commonwealth Edison Co.* v. *Allis-Chalmers Mfg. Co.*, 335 F. 2d 203 (7th Cir. 1964); *Ohio Valley Elec. Corp.* v. *General Elec. Co.*, 244 F. Supp. 914 (S.D.N.Y. 1965); *Public Util. Dist. No. 1* v. *General Elec. Co.*, 230 F. Supp. 744 (W.D. Wash. 1964); *Atlantic City Elec. Co.* v. *General Elec. Co.*, 226 F. Supp. 59 (S.D.N.Y.), appeal denied 337 F. 2d 844 (2d Cir. 1964). United also seeks comfort in a fifth decision, *Commonwealth Edison Co.* v. *Allis-Chalmers Mfg. Co.*, 315 F. 2d 564 (7th Cir. 1963) cert. denied 375 U.S. 834, which affirmed denial of an application by the state of Illinois to sue as parens patriae of Illinois electricity consumers.

decision. All of them rely on *Chattanooga Foundry and Pipe Works* v. *City of Atlanta*, 203 U.S. 390 (1906) and all save *Public District No. 1* rely on *Southern Pacific Co.* v. *Darnell-Taenzer Lumber Co.*, 245 U.S. 531 (1918). In *Commonwealth Edison*, 335 F. 2d at 208, and *Atlantic City*, 226 F. Supp. at 69, mention is made of the fact that the middleman test is not the only factor to be considered in distinguishing the oil jobber cases and of the further fact that utilities may pass on to their customers both excessive costs and any recoveries received. All the cases, most importantly, are in accord with the principle of *Commonwealth Edison Co.* v. *Allis-Chalmers Mfg. Co.*, 315 F. 2d 564 (7th Cir. 1963), *cert. den.* 375 U.S. 834 (1963), that the violations by the defendant electrical equipment manufacturers "spent themselves on these purchasers", to wit, the utility plaintiffs, and that "the aftereffects of the hurt on consumers are consequential and too remote" to give the consumers any standing to sue, *id.* at 567. The same, of course, can be said of the millions of persons who over the years have bought pairs of shoes in Hanover stores.

United misleads this Court in shocking fashion when it states, Un. Br. 65, that since Hanover sold only to four customers it would be simple for them to sue United for damages. One of the four customers is said to be the United States Government but the very finding of the District Court cited by United is that these sales were " . . . large quantities of military shoes manufactured during World War II" (A. 30) 245 F. Supp. at 264. The most shocking reference is to Sheppard & Myers, Inc. as though it was in the same category as the others. On the contrary, the cited finding of the District Court is that, except for the World War II military sales and sales to Montgomery Ward and J. C. Penney since World War II,

"Hanover has sold the shoes it manufactured directly through retail men's shoe stores operated by its wholly owned subsidiary, Sheppard & Myers, Inc." with "currently about 110 retail stores" (A. 30-31) 245 F. Supp. at 264.

It is absurd, we submit, to attempt to defeat Hanover's claim by urging, as United does on p. 65 of its brief, that the millions of ultimate consumers of Hanover shoes might bring a class action under Rule 23 of the Federal Rules of Civil Procedure.

United claims, Un. Br. 65, that if Hanover recovers treble damages for overcharges which are passed on to its customers it will not be compelled to allow the customers any of the benefits of the recovery and will thus receive a windfall. Obviously, United wants the "windfall" for itself. If United had read more carefully the electrical cases it cites it might have refrained from urging its "windfall" contention, a contention already rejected by the Court of Appeals in the Hanover passing-on case, 281 F. 2d at 481. This identical argument was made in two of the electrical cases. In *Commonwealth Edison Co.* v. *Allis-Chalmers Mfg. Co.*, 335 F. 2d 203 (7th Cir. 1964) the court held that any windfall should not go to the antitrust violator, *id.* at 209. Even more explicit was the language of the District Court for the Southern District of New York in *Atlantic City Elec. Co.* v. *General Elec. Co.*, 226 F. Supp. 59 (1964):

> "Defendants maintain that if plaintiffs are permitted to recover treble damages notwithstanding the passing on of the overcharges, they will receive a 'windfall.' Defendants are hardly in a position to urge this objection since recognition of the passing-on defense will result in a windfall to them, and if there is to be a windfall in any case, it is plaintiffs, and not defendants, who should receive it," *id.* at 70.

IX.

Answer of United Brief, Point V, pp. 66-71, that Hanover's recovery "is barred by the Pennsylvania six year statute of limitations."

United here urges that the wrong of which Hanover complains is directed against United's lease-only system and the refusal to sell that was an essential part of it, which had its inception "in or about the year 1912," Un. Br. 67, and that this marks the accrual of Hanover's cause of action. It follows, United argues, that Hanover's claim has long been barred.

Hanover's position is that the wrong of which Hanover complains is the continuing monopolization of the shoe machinery trade by United throughout the period of limitations and it seeks recovery for the injury to it during that period.

The District Court below rejected United's contentions.*

The Court of Appeals did not discuss this point in view of its holding that the period of injury did not com-

* The District Court held that:

"The injury and claimed damage flows from a continuing violation of Hanover's right to deal in a free market" (A. 100) 245 F. Supp. at 296.

* * *

"Hanover had a continuing right not to be injured in its business or property in the manner asserted under the facts of this case" (A. 103) 245 F. Supp. at 297.

* * *

". . . as long as United continued to monopolize the shoe machinery market Hanover could bring an action for the continued monopolization within the six year period . . ." (A. 104) 245 F. Supp. at 297.

mence until 1946.* However, in its supplemental opinion on United's petition for rehearing the Court of Appeals again reviewed United's contentions, correctly stated Hanover's claim to be for damages inflicted after 1939 (A. 221) 377 F. 2d at 794, and concluded:

> "The rule applicable to the facts in this case is that where the repeated and measurable invasion of a plaintiff's rights occurs both outside the statutory period and also within it, the fact that some of the injury and damage occurred outside the statutory period does not affect the plaintiff's right to recover for the separate invasion of its rights which occurred within the period. Indeed, any other rule would be an affront to reason, . . ." (A. 221-222) 377 F. 2d at 795.

This, we submit, is a correct statement of applicable law.

CONCLUSION

United's constant refrain throughout its brief is about "equities" that it claims require dismissal of this action, which "lacking justification from the outset, has now burdened the Third Circuit for twelve years," Un. Br. 71-72. The real burden has been on Hanover, which has been trying for twelve years to recover for injury to its business under the statute that gives it a cause of action.

No court below has found any lack of justification for Hanover's action. Hanover has prevailed on the merits in all courts below including the separate trial on the passing-

* The Court of Appeals held:

"The contention now made, however, is that if there was a refusal by United to sell shoe machinery to Hanover, the injury occurred many years prior to 1939, in fact perhaps even before the present century, and hence all recovery is barred by the statute of limitations. This contention falls in view of our holding that the duty to sell established by the Government decree did not come into existence until 1946. Since the injury could not have occurred prior to 1946, Hanover's claim is well within the period of the statute of limitations" (A. 211) 377 F. 2d at 791.

on issue and in No. 335 in this Court it seeks review of the two issues affecting damages that were decided against it in the Court of Appeals.

Unlike United, Hanover asks for no special "equities." It asks that its cause of action to recover damages for violation of the Sherman Act be given effect where, as here, Hanover has proved a violation of Section 2 of the Sherman Act and that the injury to its business from the violation accrued during the period of the applicable statute of limitations.

The "equities" proffered by United are ingenious attempts to escape its liability to Hanover under the statute. They have no place to bar Hanover's cause of action. This Court has often stated the important part that the private action plays in the enforcement of the antitrust laws. It should not now be impaired by acceptance of United's proffered "equities."

In effect what United claims is a prescriptive right to violate the antitrust laws. The District Court in the Government case correctly rejected United's reliance upon judgments of this Court in earlier cases in which it was a party defendant. If United's claim of bar by the earlier decisions* was not recognized in the Government case, it is hard to understand why it has any greater claim to acceptance against a private litigant.

For all of the reasons stated above, Hanover asks, as it does in No. 335, that:

1. the amended judgment of the Court of Appeals dated June 7, 1967 be reversed in so far as it

(a) orders and adjudges that the judgment of the District Court dated August 13, 1965 be vacated as to

* In its answer in the Government case, *United States* v. *United Shoe Machinery Corporation*, 110 F. Supp. 295, 298 (D. Mass. 1953), United pleaded the second decision as "a complete defense in bar" to the Government action and the third decision as a partial bar. See Answer of United in Government case, Third Defense, pp. 64-69 and Fourth Defense, *id.* pp. 69-74.

damages and a new trial awarded limited to damages, and

(b) orders that the award of counsel fees by the District Court be vacated and that said award be recomputed,*

2. the Court of Appeals be directed to affirm the judgment of the District Court dated August 13, 1965; and

3. said amended judgment of the Court of Appeals be affirmed in so far as it provides for a reconsideration by the District Court of the issues raised before the Court of Appeals, not decided by the Court of Appeals, and not in issue before this Court, with respect to Hanover's cross-appeal from the judgment of the District Court in so far as said judgment excludes from the damage calculation damages with respect to one machine, United's Goodyear Outsole Rapid Lockstitch Machine.

Respectfully submitted,

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Dated: December 22, 1967

* The award of counsel fees by the District Court was vacated by the Court of Appeals only because it had reduced the period for which damages were to be awarded and had ordered a retrial as to damages to take account of the claimed tax benefits to Hanover on account of leasing. The Court of Appeals directed that counsel fees be redetermined in the light of whatever damages the District Court might find on rehearing (A. 217) 377 F. 2d 793. There will be no need to recompute damages if this Court sustains Hanover's contentions on these points in No. 335. It follows that there will also be no need to recompute counsel fees. Hanover, therefore, asks that the amended judgment of the Court of Appeals be reversed in so far as it orders that the awards of counsel fees by the District Court be vacated.